Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL, PETITIONERS

v.

LIBERTY MUTUAL INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ARTHUR M. MURRAY
Counsel of Record

The Murray Firm
909 Poydras Street,
Suite 2550
New Orleans, LA 70112
(504) 525-8100

Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

I. Whether *Horton v. Liberty Mutual Ins. Co*, 367 U.S. 348, 81 S.Ct. 1570 (1961) can be used to thwart 28 USC 1445(c) and permit an action disguised as a "declaratory action" that does nothing more than assert affirmative defenses to pending workers' compensation actions, to permit removal and effectively defeat them.

II. Whether the Courts below were required to abstain from a declaratory action that effectively removed pending state workers' compensation actions in light of federalism concerns embodied in the Anti-Injunction Act and Fifth Circuit standards enunciated in *Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491 (5th Cir. 1988)

III. Whether the All Writs Act and re-litigation exception to the Anti-Injunction Act, and this Court's opinion in *Taylor v. Sturgell*, 128 S.Ct. 2161 (2008) permitted the Courts below to deprive Petitioners of their constitutional right to a hearing, and enjoin pending state workers' compensation actions against unnamed, unidentified parties and other actions beyond the scope of the controversy at issue.

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OPINIONS BELOW

The unpublished opinion for the United States Court of Appeals for the Fifth Circuit is reported at 2008 WL 4996608 (5th Cir. 11/25/08). The unpublished opinion of the United States District Court for the Western District of Louisiana is reported at 2007 WL 429182 (W.D. La. 11/30/07). That judgment was amended on January 4, 2008.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit, affirming the decision of the district court's order granting injunctive relief in favor of First Health and First Health's payors, was handed down on November 25, 2008. A timely Petition for Rehearing was denied on January 12, 2009. This Court has jurisdiction pursuant to 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 USC 1445(c)

> A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

28 USC 2283: The Anti-Injunction Act

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of

Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 USC 1651(a): The All Writs Act

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

U.S.C.A. Const. Amendment XIV Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Louisiana Constitution, Art. V §16

(A) Original Jurisdiction. (1) Except as otherwise authorized by this constitution or except as

heretofore or hereafter provided by law for administrative agency determinations in worker's compensation matters, a district court shall have original jurisdiction of all civil and criminal matters. (2) It shall have exclusive original jurisdiction of felony cases and of cases involving title to immovable property, except as provided in (3) below; the right to office or other public position; civil or political right; probate and succession matters; except for administrative agency determination provided for in (1) above, the state, a political corporation, or political subdivisions, or a succession, as a defendant; and the appointment of receivers or liquidators for corporations or partnerships. (3) The legislature may provide by law that a family court has jurisdiction of cases involving title to movable and immovable property when those cases relate to the partition of community property and the settlement of claims arising from matrimonial regimes when such action arises as a result of divorce or annulment of marriage.

La. R.S. 23:1310.3(E)

Except as otherwise provided by R.S. 23:1101(B), 1361, and 1378(E), the workers' compensation judge shall be vested with original, exclusive jurisdiction over all claims or disputes arising out of this Chapter, including but not limited to workers' compensation insurance coverage disputes, group self-insurance indemnity contract disputes, employer demands for recovery for overpayment of benefits, the

determination and recognition of employer credits as provided for in this Chapter, and cross-claims between employers or workers' compensation insurers or self-insurance group funds for indemnification or contribution, concursus proceedings pursuant to Louisiana Code of Civil Procedure Articles 4651 et seq. concerning entitlement to workers' compensation benefits, payment for medical treatment, or attorney fees arising out of an injury subject to this Chapter.

La. R.S. 13:4231

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent

action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

STATEMENT

A WHO CALLS TO *HORTON*

On the thirtieth of November, in the Western District Court
With livelihoods on the line, this was not just for sport
The judge on the bench, not hearing one voice
Decided the Doctors' fate, giving them no other choice.

What the Court did, which was a grievous sin
Was allowed a removal that was clearly forbidden
Thousands of comp cases, under the laws of the state
Had been brought to the feds, and it was a mistake.

The Doctors went to the Fifth, hoping for relief,
But quickly realized this would have to go to the Chief.
The problem you see, is a misapplication of law,
That will hurt all comp claimants, those big and small

In making this error that led to this Writ
The judge used a case from the bench where You sit,
He said *Horton* allowed it although we were not heard,
Our only prayer now is that You will reverse.

Much like the fabled Dr. Seuss character, in the instant case, *Horton* should not only a hear a "who", but also a "when" and a "where" regarding the applicability of this Courts' 5-4 decision in *Horton v. Liberty Mutual Ins. Co*, 367 U.S. 348, 81 S.Ct. 1570 (1961). Specifically, this Petition should be granted to reverse the lower

courts' extension of *Horton* to allow workers' compensation insurers to effectively remove pending Louisiana workers' compensation actions by filing their affirmative defenses in federal "declaratory actions." In doing so, the Courts below have clearly defeated the congressional intent of 28 USC 1445(c), and have transformed the Declaratory Judgment Act into a tool for federal courts to usurp pending workers' compensation actions from state courts. The lower courts' decisions open the floodgates and workers' compensation insurers everywhere may soon be allowed to litigate state workers' compensation actions in a federal forum at their discretion.

Not only did the Courts below allow the effective removal of pending state workers' compensation cases, but they went on to enjoin Petitioners from pursuing pending state workers' compensation actions against parties not involved in – much less identified in – this litigation. In fact, no claims have been asserted by or on behalf of these unidentified entities, and these "payors" were not mentioned by any party in this litigation until the Western District Court *sua sponte* included these "payors" in its preliminary injunction, which was later made permanent. Effectively therefore, Petitioners have been stripped of their fundamental right to a hearing under the 14th Amendment of the U.S. Constitution.

Petitioners herein, Dr. Clark Gunderson and Lake Charles Memorial Hospital, are healthcare providers who, prior to the instant action, had brought hundreds of claims against Liberty Mutual and other workers' compensation insurers and employers in Louisiana state workers' compensation court ("OWC")

alleging underpayment and late payment of their medical services rendered to occupationally ill or injured workers. The OWC is a state created judicial body constitutionally relegated with the exclusive, original jurisdiction over controversies arising under the Louisiana Workers' Compensation Act (La. R.S. 23:1021 et. seq) ("LWCA").[1] If there was any question as to the OWC's jurisdiction over the fee-payment dispute between Petitioners and Liberty Mutual, that issue was finally put to rest in a recent 7-0 opinion by the Louisiana Supreme Court in *Broussard Physical Therapy v. Family Dollar Stores Inc.*[2], followed by the Louisiana 1st Circuit Court of Appeal.[3]

Specifically, Petitioners' Louisiana workers' compensation actions against Liberty Mutual and other workers' compensation insurers involve the workers' compensation insurers' obligations to pay healthcare providers for medical services under the LWCA. The claims, defenses, and counterarguments can be summarized as follows:

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[1] See. La. Const. Art. V, §16; La. R.S. 23:1310.3

[2] *Broussard Physical Therapy v. Family Dollar Stores Inc.*, 2008-cc-1013 (La. 12/02/08), 2008 WL 5146651

[3] *Millervillage Chiropractic Center v. East Baton Rouge Parish School Board*, 2008-1350 (La. App. 1 Cir. 12/23/08), 2008 WL 5351672.

Providers' OWC Claims	**Insurers' Affirmative Defense**	**Defense not valid because:**
• Failure to pay for workers' compensation medical services timely and/or in accordance with the rates established by the LWCA • Penalties and attorneys fees as provided in LWCA	• In lieu of rates established by the LWCA, insurers accessed alleged provider contracts with a Preferred Provider Organization (PPO) network, and applied the PPO network rate	• Insurer/employer (i.e. entity accessing PPO rate) did not give notice as required by PPO Act. • LWCA prohibits insurers from accessing contracts that reduce employers' workers' compensation obligation • Payments were not timely or not made in accordance with terms of PPO contract • Employer/Insurer had no contractual authority to access provider contract.

Instead of litigating the workers' compensation fee-payment dispute in the OWC as required by Louisiana law, Liberty Mutual used the Declaratory

Judgment Act (28 USC 2201) to circumvent 28 USC 1445(c), and assert its PPO related affirmative defenses to the workers' compensation actions in federal court. Without the fee-payment controversy between the Petitioners and Liberty Mutual, the declaratory relief sought by Liberty Mutual would be abstract and hypothetical.

In light of the pending workers' compensation actions, Petitioners moved to dismiss Liberty Mutual's action asserting that the district court lacked jurisdiction and/or was required to abstain. The district court, however, relying on *Horton v. Liberty Mutual Ins. Co*, 367 U.S. 348, 81 S.Ct. 1570 (1961), denied Petitioners' motion and usurped the pending workers' compensation actions from the Louisiana workers' compensation court. The district court went on to grant a final partial summary judgment in favor of Liberty Mutual granting the declaratory relief requested. Petitioners appealed issues concerning the district court's authority to render the summary judgment; however, the Fifth Circuit dismissed Petitioners' appeal without written reasons.

Even though Petitioners were prohibited from raising issues of jurisdiction and/or mandatory abstention to the Fifth Circuit, the district court went on to use the declaratory relief granted in favor of Liberty Mutual to enjoin, *inter alia*, Petitioners' pending OWC actions against not only Liberty Mutual but any First Health "payor" – whatever that may mean – in an effort to "protect and effectuate" its judgment.

First Health, who owns and operates the First Health Preferred Provider Organization ("PPO") network, was brought into this litigation as a defendant when Liberty Mutual amended its Complaint and sought to recover from First Health indemnification for any liability imposed on Liberty Mutual in the pending OWC actions. It is undisputed that Petitioners herein were, and currently are, members of the First Health network, and that Liberty Mutual accessed and applied First Health's network rates[4]. First Health filed its own motion for summary judgment against Liberty Mutual regarding its indemnification obligations, ignoring that there had been no judgment of liability in the OWC against Liberty Mutual, and that under Louisiana law, Liberty Mutual's indemnification claims do not yet exist[5] (i.e. were not ripe for adjudication under Art. III of the U.S. Constitution).

Specifically, First Health asserted it was not required to indemnify Liberty Mutual because First Health is exempt from the statutory notice provisions of the Louisiana PPO Act (La. R.S. 40:2201, et. seq) – in other words, First Health's efforts were an attempt to obtain its own declaratory relief against Petitioners without filing any claims regarding First Health's obligations owed to Petitioners as a result of doing business in Louisiana. Obligations First Health owes to Petitioners under the Louisiana PPO Act have nothing

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[4] Liberty Mutual did not always pay the correct First Health rate and/or timely in accordance with the Providers' First Health contracts; however, the district court ignored this argument.

[5] *Suire v. Lafayette Parish Consolidated Government*, 907 So.2d 37 (La. 2005)

to do with Liberty Mutual's obligations to pay Petitioners in accordance with the LWCA, or with First Health's obligations to indemnify Liberty Mutual, and are therefore irrelevant to this litigation. In the same summary judgment in favor of Liberty Mutual, the district court partially ruled in favor of First Health regarding its indemnification obligations and, went on to enjoin Petitioners from pursuing pending or future state actions "alleging" that their contracts with First Health are "null and void because [Petitioners were] not provided with a benefit card as required by [the Louisiana PPO Act]." Even though the summary judgment in favor of Liberty Mutual involves only Liberty Mutual's obligations under the LWCA, the Court below upheld this injunction as being necessary to "protect or effectuate" the summary judgment in favor of Liberty Mutual.

It was improper for the Courts below to rely on *Horton, supra*, to usurp pending state workers' compensation actions and render declaratory relief in favor of Liberty Mutual. Therefore, the district court did not have authority to render the summary judgment, and it is invalid. Because the summary judgment is invalid, injunctions based upon that judgment are not proper under the All Writs Act and re-litigation exception to the Anti-Injunction Act. Further, the Court Below has denied Petitioners of their 14th Amendment right to a hearing over the state actions enjoined, and has enjoined actions beyond the fee-payment dispute between Petitioners and Liberty Mutual; therefore, the Court Below should be reversed.

REASONS FOR GRANTING THE PETITION

1. *Horton v. Liberty Mutual Ins. Co*, 367 U.S. 348, 81 S.Ct. 1570 (1961) should not allow an insurer to circumvent 28 USC 1445(c) and effectively remove pending workers' compensation actions.

The Court below upheld the injunctions at issue relying on the re-litigation exception to the Anti-Injunction Act (28 USC 2283) and the All Writs Act (28 USC 1651(a)), finding them necessary to "protect or effectuate" the judgment in favor of Liberty Mutual. This strict and narrow exception to the Anti-Injunction Act is founded on concepts of *res judicata*,[6] - i.e. the judgment's "preclusive effect". Under Louisiana law, which is applicable in this case,[7] for a judgment to have preclusive effect, a judgment must, *inter alia*, be "valid," in that it must have been rendered by a court with authority to hear the action.[8] Because *Horton*, supra, should not have been extended to give a federal court jurisdiction over pending state workers' compensation actions, the summary judgment does not

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[6] *Deus v. Allstate*, 15 F.3d 506 (5th Cir. 1994)

[7] *Semteck Intern Inc. v. Lockheed Martin*, 531 U.S. 497, 121 S.Ct. 1021 (02/27/01): When a Federal Court sitting in diversity renders judgment by application of state law, the judgment has the same preclusive effect that would be applied by the state in which the federal diversity sits. (i.e. Louisiana in this case).

[8] La. R.S. 13:4231 comment (d) provides "Valid and Final. To have any preclusive effect a judgment must be valid, that is it must have been rendered by a court with jurisdiction over the subject matter and over parties...."

have preclusive effect over the state actions enjoined, and the injunctions are improper.

Liberty Mutual effectively removed the Louisiana workers' compensation actions pending against it by asserting its affirmative defenses in the form of a federal declaratory action. In sum, Liberty Mutual sought declaratory relief that it paid Petitioners in accordance with the LWCA because it accessed Petitioners' provider agreements with First Health and paid First Health's PPO network rates in lieu of the rates established by the LWCA. With respect to Liberty Mutual, issues involving the propriety of access to the First Health provider agreements arise only as a defense to the pending OWC actions and should not characterize the nature of the controversy[9]. Without the fee-payment dispute, the declaratory relief sought by Liberty Mutual would be abstract and hypothetical, depriving a federal court of authority to render declaratory relief under the Declaratory Judgment Act[10]. Further, a unanimous Louisiana Supreme Court and the Louisiana 1st Circuit Court of Appeal recently recognized that the PPO defense does not alter the OWC's jurisdiction over the fee payment dispute, which

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[9] See *Public Service Commission v. Wycoff Co.*, 344 US 237, 73 S.Ct. 236 (1953): The character of the declaratory defendants' threatened action, not the defenses thereto, determines a court's authority to hear a declaratory action.

[10] *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667, 70 S.Ct. 876 (U.S. 1950).

undeniably arises under the LWCA.[11] Therefore, the Court below was *Erie*-bound to recognize the same.

Instead, the Court below relied on *Horton v. Liberty Mutual Ins. Co*, 367 U.S. 348, 81 S.Ct. 1570 (1961) in finding that the district court had authority to hear the declaratory action even though the declaratory action effectively removed pending state workers' compensation actions. The 5-4 decision in *Horton*, however is distinguishable in that it recognizes in passing only whether an original cause of action for *de novo* judicial review of a Texas workers' compensation board's award is within a district court's original jurisdiction. Even the Fifth Circuit in *Horton*, recognized that "as conditions precedent to the filing of the suit....[a] claim must have been filed with the board, and the board must have a final ruling and decision.[12]" Unlike Louisiana law which has constitutionally relegated the OWC with the original, exclusive jurisdiction over cases arising under the LWCA, Texas law had created an administrative board whose decisions were not binding and always subject to review by a "court." At the time of *Horton*, Texas law allowed either party to bring an original action in a court of first instance to set aside an award granted by the board.[13] Liberty Mutual's instant action, however,

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[11] *Broussard Physical Therapy v. Family Dollar Stores Inc.*, 2008-cc-1013 (La. 12/02/08), 2008 WL 5146651; *Millervillage Chiropractic Center v. East Baton Rouge Parish School Board*, 2008-1350 (La. App. 1 Cir. 12/23/08), 2008 WL 5351672.

[12] Liberty Mut. Ins. Co. v. Horton, 275 F.2d 148, 160 (5th Cir.1960)

[13] Vernon's Tx. Ann. Civ. Stat. Art. 8307, s 5 (1960); Horton, supra; Liberty Mut. Ins. Co. v. Horton, 275 F.2d 148 (5th Cir.1960)

is neither an original action, nor an action to set aside a ruling from the OWC. Instead, it is an effective removal of pending Louisiana workers' compensation actions.

In fact, Chief Justice Warren, and Justices Clark, Brennan, and Stewart reflected on the policies underlying 28 USC 1445(c) and dissented in *Horton* stating that

> "..[t]oday's decision effectively emasculates the recent congressional attempt to limit diversity jurisdiction, especially in workers' compensation cases. In order to decrease the "workload of the Federal Court's," which "has greatly increased because of the removal of workmen's compensation cases from the State courts to Federal Courts," the Judicial Conference of the United States urged the passage of .....[28 USC 1445(c)].... Workmen's compensation cases were singled out and specifically dealt with because they "arise and exist only by virtue of State laws. No federal question is involved and no law of the United States is involved in these cases (citations omitted)." (emphasis added)
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> ".....[A] clearer expression of the congressional dislike for saddling federal courts with such cases could hardly be imagined. We should therefore give effect to this policy wherever possible. Not only does the decision of today fail to do this, but the Court goes out of its way to defeat the congressional intent. The statement

> that "the workman has the option to file his case in either the Federal or State courts (citations omitted) is no longer correct. It is now an unequal race to the courthouse door- a race that the insurers will invariably win.....Thus the Court – contrary to the specifically expressed intention of the Congress – grants the insurance company with the option of going into federal court, with all its attendant difficulties to the already over-burdened federal judiciary and impecunious workman." (emphasis added)

Expanding *Horton* to allow a federal court to usurp pending state workers' compensation actions by way of a declaratory judgment sets precedent for allowing any workers' compensation insurer to do the same. Such precedent will have the opposite effect of the polices underlying 28 USC 1445(C), will increase a federal court's workload of workers' compensation actions, and force workers' compensation claimants to litigate their claims in federal court even if they originally choose to file a state court action. In fact, in this very action, Liberty Mutual has successfully amended its complaint to add two additional Plaintiffs and eight new defendants thereby effectively removing over 200 additional pending workers' compensation actions involving over 1,000 individual payments to the providers.

Even the Fifth Circuit has recognized on several previous occasions that it lacks jurisdiction over pending workers' compensation actions or workers' compensation actions where the parties have not exhausted their administrative remedies; yet the Court below failed to recognize these cases. In *Dial v.*

Hartford Accident and Indemnity Company, 863 F.2d. 15 (5th Cir. 1989), an injured worker filed two separate actions against an insurer – one in state workers' compensation court, and one in federal court. In dismissing the federal action for lack of jurisdiction, the court recognized that the case was governed by Mississippi law, which required the claimant to exhaust all administrative remedies prior to filing an action in federal court. The Fifth Circuit recognized that the Mississippi legislature had placed the issue before an administrative body with special expertise in the field. Similarly, in *Hedrick ex. rel. Adams v. Texas Workers' Compensation Commission*, 54 Fed. Appx. 592 (5th Cir. 2002), 2002 WL 31730360, which like *Horton* involved Texas Workers' Compensation law, the Fifth circuit dismissed the Plaintiffs' action because, unlike in *Horton*, the Plaintiff had not exhausted its administrative remedies and utilized the administrative board prior to bringing the federal action..

Additionally, like the dissent in *Horton*, the Fifth Circuit has recognized that 28 USC 1445(c) reflects a strong congressional policy that where a state workers' compensation court has been utilized by one of the parties, the case should remain in the state court for its ultimate disposition. *Kay v. Home Indemnity Co*, 337 F.2d 898 (5th Cir. 1964). **Workers' compensation claims are "the most local of local causes,"** that should be "held in the state forum in which...the ultimate authoritative determination can alone be made." *Id.* at 902. This recognition is clearly in line with the 10th Amendment to the U.S. Constitution which states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Louisiana Constitution has specifically created a special workers' compensation court with the power and authority to adjudicate disputes arising under the LWCA – including the instant fee-payment dispute – and 28 USC 1445(c) specifically divests federal courts of authority to hear removed state workers' compensation actions. Therefore, *Horton*, should not be utilized to circumvent the 28 USC 1445(c) or the 10th Amendment.

Similarly, in *Ryder Services Corp. v. Savage*, 945 F.Supp.232 (N.D. Ala. 1996), an employer brought a federal declaratory action against an injured worker prior to being sued in state court. In questioning the "highly creative thinking by the Plaintiffs," as well as the lack of precedent involving similar declaratory actions, the district court dismissed the employers' action because Alabama courts had exclusive jurisdiction over issues pertaining to workers' compensation liability. The court reasoned that even if the workers' compensation claimant filed a suit in state court after the federal action had been filed, the state court would owe no deference to the federal court. Instead, the federal court should defer to, and not interfere with, state court proceedings.

Even the Western District, in the case of *Sentry Insurance Company v. Southwest Louisiana Hospital, et. al*, had a change of heart following the instant case

and recognized the impropriety of relying on *Horton* to keep Sentry's declaratory action involving the same fee-payment dispute pending in Louisiana workers' compensation court[14]. Similarly, the same Western District reached a similar result in another workers' compensation fee-payment dispute, but later went on to reverse itself on rehearing[15]. Clearly, therefore, guidance is needed on this issue – otherwise, the same pattern of events will allow workers' compensation insurers to remove the 1000's of similar fee payment disputes pending in Louisiana's workers' compensation courts, and allow the federal district court to interfere with Louisiana's developing law on exclusively state workers' compensation issues raised herein.

It is clear that *Horton*, *Dial*, *Hedrick*, *Kay*, and *Ryder* all recognize that when a federal court sits in diversity, it must give deference to state workers' compensation law. As stated herein, the Louisiana OWC is a judicial body with the exclusive, original jurisdiction over the fee-payment dispute between Liberty Mutual and Petitioners. Because the fee-payment dispute was pending prior to the initiation of Liberty Mutual's declaratory action, as recognized by Liberty Mutual in its own complaint, *Horton*, should not be extended to allow the effective removal of those actions. Because the district court lacked authority to render the summary judgment in favor of Liberty

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[14] 06 570 (W.D. La. 6/4/08) – this case is not available on Westlaw but is included in the Appendix

[15] *Isle of Capri Casinos, Inc. v. COL Management*, 2008 WL 4792686 (W.D. La. 11/3/08), *vacated on reconsideration by*, 2009 WL 259667 (W.D. La. 2/3/09).

Mutual, the injunctions meant to "protect or effectuate" that judgment are invalid and should be overturned.

2) Pending state workers' compensation actions required abstention from Liberty Mutual's declaratory action.

In addition to recognizing the improper expansion of *Horton*, the Court below should have recognized that, because of the pending workers' compensation actions, the district court lacked authority to render the summary judgment under policies of federalism embodied in the Anti-Injunction Act, as recognized by the Fifth Circuit in *Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491, 505 (5th Cir. 1988). Diversity jurisdiction, alone, does not determine whether a declaratory action can be decided[16], and therefore, the Court below should have considered whether the district court's judgment was invalid for failure to abstain,[17] as mandated by Fifth Circuit standards. Because abstention was mandatory, the underlying summary judgment was invalid, and the injunctive relief based thereon is likewise invalid.

In *Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491, 505 (5th Cir. 1988), otherwise known as "*Jackson II*", the Fifth Circuit recognized that

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[16] *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.Ct. 2137 (U.S. 1995).

[17] *Orix Credit Alliance v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000)

> "One of the main purposes of the Federal Declaratory Judgment Act...was to provide a means to grant litigants judicial relief from legal uncertainty in situations that had not developed sufficiently to authorize traditional coercive relief. Litigants would no longer be put to the Hobson's choice of foregoing their rights or acting at their peril, nor, if they had already acted, would they be forced to wait, for perhaps many years, until the statute of limitations expired, to know whether they had been subjected to some significant liability. *See e.g. Perez v. Ledesma*, 401 U.S. 82 (1971)(opinion of Justice Brennan, joined by Justices White and Marshall concurring in part, dissenting in part).....[W]ith the enactment of the statute the courts would no longer have to tell the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it."

However, when a state proceeding has already been filed against the declaratory Plaintiff, "there [is] no putative mushroom that [the declaratory plaintiff] wishe[s] to eat", nor is the declaratory Plaintiff in the position of not knowing when its potential liability will ever be judicially determined. *Id.* When the declaratory action involves nothing more than the declaratory-defendant's state suit, then the only purpose and effect of the declaratory action is to defeat the state court action. *Id.* Under such circumstances, the Fifth Circuit has recognized that it has no authority to hear the declaratory action. *Id.*

> "To allow declaratory relief in these circumstances would be to transform section 2283 from a pillar of federalism reflecting the fundamental constitutional independence of the states and their courts, to an anachronistic, minor technicality, easily avoided by mere nomenclature or procedural sleight of hand. A federal declaratory judgment will, or course, be *res judicata* of the state suit, thus resolving it as surely as an injunction, and in any event the declaratory judgment can itself be enforced by injunction under 28 USC 2202 pursuant to the "protect or effectuate" exception to 2283." *Id.*

Accordingly, the Fifth Circuit held in *Jackson II* that, "if an injunction would be barred by [the Anti-injunction Act], the district court is also barred from issuing a declaratory judgment that would have the same effect as an injunction. *Id.* 506. *Jackson II* was reaffirmed in *Travelers Insurance Company v. Louisiana Farm Bureau Federation Inc.*, 996 F.2d. 774 (5th Cir. 1993) and *Sherwin Williams v. Holmes County* 343 F.3d 383 (5th Cir. 2003). The Louisiana OWC is a judicial body with the exclusive, original jurisdiction to declare and enforce liabilities under the LWCA[18] – including the fee-payment dispute at issue – therefore the Anti-Injunction Act would have prevented the district court from enjoining the pending state workers compensation actions against Liberty Mutual at the time Liberty Mutual initiated this

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[18] Article V, section 19 of the Louisiana Constitution and La. R.S.23:1310.3

litigation, the declaratory action should not have been granted under *Jackson II*[19].

Further, the Court below failed to consider whether the district court should have exercised its broad discretion under the Declaratory Judgment Act (28 USC 2201) and abstained from Liberty Mutual's declaratory action. In light of *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 62 S.Ct. 1173 (1942), the Fifth Circuit requires courts to consider issues concerning the proper allocation of decision making between state and federal courts, fairness, and efficiency when evaluating whether to abstain from a declaratory action. The Fifth Circuit has developed specific factors that must be considered. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d. 383 (5th Cir. 2003).

Specifically, a court must consider (1) whether there is a pending state action in which the controversy at issue may be fully litigated, (2) whether the plaintiff filed suit in anticipation of the lawsuit filed by defendant, (3) whether plaintiff engaged in forum shopping in brining suit, (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist, (5) whether federal is a convenient forum for parties and witnesses, and (6) whether retaining the lawsuit in federal court would serve purposes of judicial economy. ("*Trejo* factors").

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[19] See *Roudebush v. Harike, Roudebush v. Hartke* 405 U.S. 15, 92 S.Ct. 804 (1972), and *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67 (1908): the Anti-Injunction Act applies to state judicial bodies that perform "judicial functions" and/or make "judicial inquiries."

St. Paul Ins. v. Trejo, 39 F.3d 585, 590-591 (5th Cir. 1994).

The first factor weighs in favor of abstention because the only controversy between Liberty Mutual and Petitioners (i.e. the fee payment dispute) was previously pending in the OWC. Abstention under this factor is not only proper, but mandatory as explained above.

The second, third and fourth, *Trejo* factors also weigh in favor of abstention. The Fifth Circuit has recognized that a Court should abstain when a declaratory action was filed for improper and/or abusive purposes. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d. 383 (5th Cir. 2003). Liberty Mutual's action seeks no purpose other than to circumvent 28 USC 1445(c), undermine the pending OWC actions and interfere with the developing law on the issues presented.

Factors five and six focus on efficiency concerns. *Sherwin-Williams*, supra. Specifically, the court should avoid duplicative or piecemeal litigation if possible. *Id.* Further, these factors raise federalism and comity concerns because of the potential of inconsistent state and federal court proceedings in cases involving state issues. The Louisiana OWC has been constitutionally granted with authority to adjudicate the fee payment dispute at issue, and there are thousands of similar cases pending in the OWC. Therefore, the potential of inconsistent state and federal court proceedings should have lead to abstention given that issues raised herein were properly moving their way through Louisiana's judicial system. It was improper for the Courts below

to interfere with Louisiana's developing law pertaining to the LWCA.

Further, the fact that Liberty Mutual has, in addition to its claims for declaratory relief, also asserted breach of contract claims – which have been pending for over four years – should not affect the abstention analysis or the district court's lack of authority to hear the declaratory action. The contract claims are not supported under any theory of law and were clearly brought to undermine this Court's authority to abstain from the declaratory action. Liberty Mutual asserts that Petitioners breached their contracts with First Health by filing actions against Liberty Mutual in the OWC, and that Liberty Mutual is therefore entitled to damages. The only "damages" that Liberty Mutual could incur would be a judgment of liability against it from the OWC, making the breach of contract claims illogical. Further, Petitioners contracts with First Health do not allow for the recovery of attorney's fees in the event of a breach, so Liberty Mutual's "breach of contract" theory further fails.

Because abstention should have been mandatory given the pending state worker' compensation actions, the district court lacked authority to render the summary judgment in favor of Liberty Mutual. Therefore, the injunction that supposedly "protects or effectuates" that judgment is likewise improper.

3. Petitioners were denied due process rights to a hearing when they were enjoined from pending workers' compensation actions against unnamed, unidentified entities not involved in this litigation.

It is a principle of general application in Anglo-American jurisdiction that one cannot be bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Taylor v. Sturgell*, 128 S.Ct. 2161(2008), citing *Hansberry v. Lee*, U.S. 311 US 32, 61 S.Ct. 115 (1940). Yet, Gunderson and LCMH have been enjoined from pursuing hundreds of pending workers' compensation actions against "First Health's payors," who are not involved in, or otherwise named in, this litigation, without the right to a hearing. Arguably, First Health's "payors" could include any employer, insurance company, or TPA who has accessed, applied, and/or benefited from a First Health discount being applied to a bill for workers' compensation services, yet not one of the thousands of payments made to Petitioners involving First Health PPO discounting was evaluated for accuracy, much less submitted, in this litigation. Instead, the district court, in granting preliminary injunctive relief in favor of First Health, *sua sponte* included "First Health's payors" in the preliminary injunction, and then went on to render a permanent injunction in favor of First Health's payors under an expanded theory of "privity."

The Courts Below found that the First Health payors, although unnamed, unidentified, and in no way involved in this litigation, were somehow "in privity" with Liberty Mutual sufficient to make them bound by the judgment in favor of Liberty Mutual. This

expansion of the concept of privity is equivalent to a "virtual representation" theory clearly prohibited by this Court's recent decision in *Taylor v. Sturgell*, 128 S.Ct. 2161 (2008). There is no evidence that these "payors" fit into one of the six categories enumerated in *Taylor*, sufficient to allow these non-party "payors" to be bound by a judgment in favor of Liberty Mutual[20]. Further, these "payors" necessarily include Louisiana employers and/or insures who would have precluded diversity jurisdiction had they been named as parties.

Liberty Mutual never asserted that it was filing this action on behalf of anyone else other than itself, there is no reference to any "payor" in the judgment in favor of Liberty Mutual, and neither Petitioners nor these "payors" had any notice that these "payors" would be included in the judgment in favor of Liberty Mutual. Effectively, however, the Courts below removed and enjoined not only the fee-dispute between Petitioners and Liberty Mutual, but any similar fee-payment dispute between Petitioners and "First Health's payors" – whatever that may mean – regardless of whether those "payors" paid timely, in accordance with the terms of the provider agreements, or even had contractual authority to access First Health's network.

Further, Liberty Mutual never asserted that it was filing an action against Petitioners on behalf of

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[20] The Fifth Circuit recognizes only three situations in which a non-party can be in privity with a party for res-judicata purposes: 1) if he is a successor in interest to the party's interest in property; 2) if he controlled the prior litigation; or 3) if the party adequately represented his interests in the prior proceeding." *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183 (5th Cir. 1990)

First Health, yet the Courts below again expanded the concept of "privity" and recognized First Health as being in privity with Liberty Mutual sufficient to bind First Health to the judgment in favor of Liberty Mutual and against First Health. Not only does First Health not fit into one of the six categories enunciated in *Taylor, supra*, Liberty Mutual sued First Health for indemnity in this action. In fact, First Health filed not one claim against Petitioners or Liberty Mutual in this matter, yet has obtained an injunction in its favor well beyond the scope of the judgment in favor of Liberty Mutual.

As explained above, for an injunction to be proper under limited exception recognized by the All Writs Act and re-litigation exception to the Anti-Injunction Act, the underlying judgment which the injunction "protects or effectuates" must have *res judicata*, or preclusive, effect over the state actions enjoined. In addition to a final, valid judgment by a court of competent jurisdiction and identity of the parties, Louisiana's *res judicata* law (La. R.S. 13:4231), which is applicable here[21], always requires an identity of the cause of action and an identity of the thing demanded. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425 (5th Cir. 2000)[22]. Therefore, the

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[21] *Semtek Intern Inc. v. Lockheed Martin*, 531 U.S. 497, 121 S.Ct. 1021 (02/27/01)

[22] The Courts below relied upon the Fifth Circuit's 4-part test developed before *Semteck* – i.e. 1) a court of competent jurisdiction must have rendered the prior judgment; 2) the parties in both actions must be identical, or at least in privity with each other; 3) there must have been a final judgment on the merits in the previous decision; and 4) the Plaintiff must raise the same cause of

declaratory relief in favor of Liberty Mutual does not have *res judicata* effect as to First Health, or the unidentified "payors" of First Health.

Based upon the judgment rendered in favor of Liberty Mutual, and against Petitioners involving Liberty Mutual's obligations to pay Petitioners under the workers' compensation Act, Petitioners were enjoined from pursuing any state action in any state court alleging that their contracts with First Health are "null and void because [Petitioners were] not provided with a benefit card as required by [the Louisiana PPO Act]." Therefore, the injunctive relief involves actions involving a separate and distinct cause of action, and "thing demanded." Liberty Mutual sought declaratory relief regarding its workers' compensation obligations, yet Petitioners have been enjoined from asserting breach of contract actions against First Health, who, in the context of this litigation, is not a workers' compensation payor (i.e. insurer, TPA) and has no obligations under the workers' compensation Act.

The All Writs Act and re-litigation exception to the Anti-Injunction action are narrow and are not to be enlarged by loose statutory construction. *Chick Kam Choo v. Exxon*, 486 U.S. 140, 108 S.Ct. 1684 (1988). Yet the Courts below have loosely construed the relevant statutes to effectively remove hundreds, if not thousands, of pending workers' compensation actions, and allow entities not involved in this action to benefit from a judgment in favor of only Liberty Mutual.

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action or claim in both suits. *Regions Bank of Louisiana v. Rivet*, 2224 F.2d 483, 488 (5th Cir. 2000). However, it failed to realize that the actions enjoined were not the same as the actions litigated.

Further, the Anti-Injunction Act is a pillar of federalism that is not meant to be avoided by mere nomenclature or procedural sleight of hand.[23] Therefore, enjoining pending state workers' compensation actions, which are the "most local of local causes,"[24] against entities who are not part of this litigation – much less identified – is contrary to well established policies of comity and federalism, and far exceeds the limited power relegated to federal courts to enjoin state workers' compensation actions.

CONCLUSION

The Court below improperly expanded *Horton*, supra, to allow a workers' compensation insurer to remove pending state workers' compensation actions by asserting its affirmative defenses in a declaratory action, and now Petitioners herein respectfully urge this Court to examine the proper scope and application of *Horton*. Further, issues underlying the Anti-Injunction Act, as recognized by the Fifth Circuit, should have mandated abstention over the workers' compensation dispute given that the same dispute was pending in state workers' compensation courts; therefore, the summary judgment in favor of Liberty Mutual is invalid, rendering the injunctions based thereon invalid as well. Further, it was not necessary to deprive Petitioners' their due process right to a hearing, and enjoin pending workers' compensation actions against unidentified entities in order to "protect

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[23] *Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491, (5th Cir. 1988).

[24] *Kay v. Home Indemnity Co*, 337 F.2d 898 (5th Cir. 1964)

or effectuate" the judgment in favor of Liberty Mutual. The Court below exceeded its narrow authority to enjoin state actions well beyond the scope of the instant workers' compensation related controversy, and therefore, Petitioners herein respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED:

ARTHUR M. MURRAY
THE MURRAY FIRM
909 Poydras Street, Suite 2550
New Orleans, LA 70112-4000
Telephone: (504) 525-8100

(any footnotes trail end of each document)
No. 08-30075 Summary Calendar
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee

v.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL, Defendants-Appellants

November 25, 2008, Filed

Appeal from the United States District Court for the Western District of Louisiana. USDC No. 2:04-CV-2405.

Before STEWART, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM: *

Defendants-Appellants Dr. Clark Gunderson and Lake Charles Memorial Hospital (jointly "Gunderson") appeal the district court's grant of First Health Group Corporation's ("First Health") motion for a permanent injunction and stay of proceedings. Appellee First Health requests that this Court dismiss the instant appeal for lack of jurisdiction. We DENY First Health's motion to dismiss, and AFFIRM the district court's grant of the permanent injunction.

I. FACTUAL AND PROCEDURAL BACKGROUND

The parties in this case have a long and complicated history of litigation. The factual and procedural background relevant to the instant appeal is provided below.

> Liberty Mutual entered into an agreement ("PPO Contract") with [First Health] whereby First Health agreed to make available to Liberty Mutual various hospitals and medical providers. Defendants, Dr. Clark Gunderson ("Gunderson") and Lake Charles Memorial Hospital ("LCMH") entered into "Provider Agreements" with First Health for the delivery of medical services at discounted rates to "Payors," namely in this suit, Liberty Mutual. . . . Gunderson and LCMH asserted in [a prior] suit that the payment provision of their Provider Agreements is null and void under the disclosure rules of Louisiana's Any Willing Provider Act, Louisiana Revised Statute 40:2203.1, because [Liberty Mutual] (the preferred provider organizations and third party administrators) failed to comply with the statute's notice provisions. Thus, Gunderson and LCMH, assert that they are entitled to additional monies [from Liberty Mutual] for medical services performed, in addition to statutory penalties and attorneys' fees.
>
> Liberty Mutual filed this suit requesting that the Court enter a judgment declaring that (1) the Provider Agreements are valid and enforceable, (2) Liberty Mutual is obligated to pay Gunderson and LCMH only the negotiated rates for medical

> services performed, (3) Gunderson and LCMH are not entitled to be paid amounts in excess of the negotiated rates, (3) [*sic*] Gunderson and LCMH have no cause of action under any law, statute, or regulation against Liberty Mutual, and (5) Gunderson and LCMH's efforts to receive additional monies violate their contracts which constitutes a breach of those contracts, entitling Liberty Mutual to damages and indemnity, including, but not limited to attorneys [*sic*] fees.
>
> In its Second Amended Complaint, Liberty Mutual added as a defendant, [*sic*] First Health. . . . Liberty Mutual maintains that pursuant to the PPO Contract, First Health agreed to "fully indemnify and hold harmless [Liberty Mutual] . . . from and against any and all claims . . . .
>
> First Health filed a motion for summary judgment maintaining that because the Provider Agreements are valid and enforceable, First Health is not obligated to indemnify Liberty Mutual. . . . Liberty Mutual filed a motion for partial summary judgment seeking a declaration against Gunderson and LCMH that the Provider Agreements with First Health are valid and enforceable.

Liberty Mutual Ins. Co. v. Gunderson, No. 04-cv-2405, 2006 U.S. Dist. LEXIS 10278 (W.D. La Feb. 15, 2006) (Mem. Ruling). On February 15, 2006, the district court made the following rulings at the summary judgment stage:

> (1) the discount provisions in the Provider Agreements between First Health and Gunderson and LCMH are valid and enforceable because there are no prohibitions in the Louisiana Workers' Compensation law that prevent a provider from agreeing to charge and received discounted rates for the services they provide to occupationally ill or injured workers, and (2) the payment provisions of the provider Agreement between Liberty Mutual and Gunderson and LCMH are not null and void because Louisiana Revised Statute § 40.2203.1 expressly states that the notice requirement provisions shall not apply to group purchasers (First Health) or to agreements of a group purchaser (payors such as Liberty Mutual who have an agreement with First Health).

Liberty Mutual Ins. Co., No. 04-cv-2405, 2007 U.S. Dist. LEXIS 89479, *3 (W.D. La. Nov. 30, 2007) (Memorandum Ruling).

On October 30, 2006, the district court issued a temporary restraining order and preliminary injunction against Gunderson preventing him from pursuing any claim before any court arising under Louisiana's Any Willing Provider Act against First Health or any payor as set forth in the provider agreements between First Health and Gunderson. Gunderson did not file an appeal to the district court's order granting the preliminary injunction.

On August 24, 2007, Liberty Mutual filed a motion for civil contempt and sanctions, for a permanent injunction, and for stay of proceedings pursuant to the

All Writs Act, 28 U.S.C. § 1651(a).[1] Liberty Mutual alleged that Gunderson continued to file and prosecute claims in violation of the October 2006 preliminary injunction.

On September 27, 2007, First Health requested an order holding Gunderson in civil contempt for violating the October 2006 preliminary injunction. First Health also requested that the district court permanently enjoin Gunderson from relitigating in the Louisiana state workers' compensation system factual and legal issues actually decided by the district court's February 2006 memorandum ruling and April 2006 amended judgment.[2]

On November 30, 2007, the district court granted First Health's motion for a permanent injunction and stay of proceedings. The district court agreed that Gunderson violated the district court's October 2006 preliminary injunction when it continued to file and prosecute claims against First Health's payors in the Louisiana Office of Workers' Compensation ("OWC"). On January 2008, the district court granted a motion to amend the November 2007 judgment, to correct the time period regarding Gunderson's contract with First Health.

On January 10, 2008, Gunderson filed a notice of appeal from the November 2007 judgment, permanent injunction, and stay order, as well as the January 2008 amended judgment, permanent injunction, and stay order. On appeal, Gunderson argues that the district court erred when it applied the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, to this case.

On May 16, 2008, First Health filed a motion to dismiss the appeal for lack of jurisdiction.

II. APPELLATE JURISDICTION

First Health contends that Gunderson claims to appeal from the district court's November 2007 and January 2008 judgments granting the permanent injunction, but in actuality Gunderson is impermissibly attempting to appeal for the first time the October 2006 and April 2006 judgments granting the preliminary injunction. First Health refers to the preliminary injunction as the "original injunction." First Health claims the permanent injunction served merely to clarify the preliminary injunction and is not independently appealable; therefore, this Court has no jurisdiction to hear the appeal because Gunderson failed to appeal from the preliminary injunction.

First Health acknowledges that 28 U.S.C. § 1292(a)(1) grants this Court jurisdiction to entertain appeals from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."[3] But First Health argues that the permanent injunction served merely to clarify the scope of the earlier preliminary injunction, and "interlocutory appeals are not allowed when a court merely enforces or interprets a previous injunction." *Ingram Towing Co. v. Adnac Inc.*, 59 F.3d 513, 516 (5th Cir. 1995). Gunderson argues that it is well settled that once an order of permanent injunction is granted, the order of preliminary injunction is merged with it and an appeal is proper only from the order granting the permanent injunction. *Louisiana World Exposition, Inc. v. Logue*,

746 F.2d 1033, 1038 (5th Cir. 1984); *SEC v. First Fin. Group*, 645 F.2d 429, 433 (5th Cir. 1981) (internal citations omitted).

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The district court did not merely enforce or interpret the preliminary injunction. Instead, the district court broadened the scope of the injunction and converted the preliminary injunction into a permanent injunction. In this situation, under *First Financial Group* and *Louisiana World Exposition, Inc.*, an appeal is proper *only* from the order granting the permanent injunction. First Health's argument that Gunderson waived the opportunity to appeal the validity of issues related to the original preliminary injunction fails, because the permanent injunction merged the two injunctions into one.

The motion to dismiss for lack of jurisdiction is, therefore, DENIED. We now turn to Gunderson's appeal from the district court order.

III. ANALYSIS

A. Standard of Review

The district court's decision to issue a permanent injunction is reviewed for abuse of discretion. *Regions Bank v. Rivet*, 224 F.3d 483, 488 (5th Cir. 2000) (citation omitted). "The application of the relitigation exception is an issue of law, and therefore this [C]ourt reviews de

novo the lower court's determination that an injunction may be issued under that exception." *Id.*

B. Discussion

The issue on appeal is the permanent injunction issued by the district court on January 2008. Gunderson appeals the portion of the injunction which enjoins claims against First Health and/or its "unidentified payors." Gunderson does not appeal the permanent injunction applicable to claims against Liberty Mutual.

Gunderson makes four basic arguments to support the conclusion that the district court erred in granting a permanent injunction in favor of First Health and its payors: (1) that the district court improperly applied the All Writs Act and the relitigation exception of the Anti-Injunction Act; (2) that the district court lacked subject matter jurisdiction; (3) that the absence of a judgment between Gunderson and First Health precludes the relief granted by the district court; and (4) that including First Health's "payors" within the scope of the injunction rendered the injunction too general to pass muster under Federal Rule of Civil Procedure ("Rule") 65.

1. All Writs Act and the Relitigation Exception

Gunderson contends that it was improper for the district court to rely upon the All Writs Act and the relitigation exception to the Anti-Injunction Act to enjoin Gunderson from pursuing claims pending in both Louisiana state court and in the OWC. As explained in *Regions Bank v. Rivet*, this Court utilizes a four-part test to determine whether the relitigation exception to

the Anti-Injunction Act applies to preclude litigation of a claim in state court. 224 F.3d at 488. Specifically,

> (1) "the parties in a later action must be identical to (or at least in privity with) the parties in a prior action"; (2) "the judgment in the prior action must have been rendered by a court of competent jurisdiction"; (3) "the prior action must have concluded with a final judgment on the merits"; and (4) "the same claim or cause of action must be involved in both suits."

Id. (5th Cir. 2000) (citations omitted). Gunderson argues that these requirements are not met in this case. We disagree. This section will address *Regions Bank* factors one, three, and four. Factor two is discussed below as it is related to a separate claim made by Gunderson.

A. Factor One

To the extent that Gunderson attempts to bring any claims, whether in federal court, state court, or the OWC, against Liberty Mutual involving the district court's ruling at the summary judgment stage, the parties in the future actions would be identical, and *res judicata* applies. *Vines v. Univ. of La.*, 398 F.3d 700, 709 (5th Cir. 2000). Gunderson does not dispute that he is precluded from bringing any claims of this nature against Liberty Mutual.

Further, this Court finds that First Health and its "payors" are in privity with Liberty Mutual. "Privity is a 'legal conclusion that the relationship between the one who is a party on the record and the non-party is

sufficiently close to afford application of the principle of preclusion.'" *Id.* at 706. As this Court explained in *Howell Hydrocarbons, Inc. v. Adams*, a party is in privity with a party for *res judicata* purposes "if the party adequately represented his interest in the prior proceeding." 897 F.2d 183, 188 (5th Cir. 1990). Liberty Mutual and other "payors" entered into Provider Agreement contracts with First Health. Liberty Mutual and First Health actively disputed Gunderson's claims that (1) the discount provisions contained in the Provider Agreements are unenforceable, and (2) that the payment provisions contained in the Provider Agreements do not apply to group purchasers or to agreements of group purchasers. The contractual relationship between First Health and its payors, as well as the identical litigation position against Gunderson in suits over these contractual provisions, evidence to this Court that First Health and its "payors" are in privity with Liberty Mutual. Factor One is satisfied.

B. Factor Three

Factor Three requires that the prior action conclude with a final judgment on the merits. The district court's use of the relitigation exception and decision to issue a permanent injunction were based on its summary judgment ruling in favor of Liberty Mutual. Gunderson abandoned any ability to appeal the district court's summary judgment ruling.[4] Factor Three is satisfied.

C. Factor Four

Factor Four requires that both disputes involve the same claim or cause of action. The claims at issue in the

instant case, and the claims filed by Gunderson in the OWC, all involve discount and payment provisions in Provider Agreements between First Health and Gunderson. First Health's payors provided payments to Gunderson under the provisions found in these Provider Agreements between First Health and Gunderson. Gunderson repeatedly attempted to make claims against First Health's payors, arguing that the payors improperly discounted rates for their services under these Agreements, despite the district court's rejection of that very argument in its ruling that the Provider Agreements are valid and enforceable.

In addition, collateral estoppel precludes Gunderson from pursuing any future claims that would involve relitigating the issues decided by the district court when it granted summary judgment against Gunderson. *Vines*, 398 F.3d at 709 (explaining that collateral estoppel requires the same issue, fact, or law be actually litigated and determined in a prior judgment). Gunderson is barred from attempting to bring a claim in federal court, state court, or the OWC that would involve deciding the validity of the discount or payment provisions contained in Provider Agreements between First Health and its payors. The district court decided these issues on summary judgment, and Gunderson abandoned its appeal of the rulings contained in the district court's grant of summary judgment. Factor Four is satisfied.

2. Subject Matter Jurisdiction (Regions Bank Factor Two)

Gunderson alleges that the district court did not have subject matter jurisdiction to decide the instant case.

To demonstrate the district court's lack of subject matter jurisdiction, Gunderson points to similar lawsuits where the same district court found that it lacked jurisdiction. *See Sentry v. Lake Charles Mem'l*, 2:06-cv-00570, 2008 U.S. Dist. LEXIS 44183 (W.D. La. June 4, 2008); *AIG v. Gunderson*, 2:05-cv-247 (W.D. La. May 11, 2005); *Gunderson v. F.A. Richard & Assocs.*, 2:04-cv-1242, 2005 U.S. Dist. LEXIS 41625 (W.D. La. Mar. 23, 2005).[5] Gunderson, however, in making this argument ignores that the district court had proper diversity jurisdiction over this case. The Supreme Court explained in *Horton v. Liberty Mutual Insurance Co.* that state workers' compensation claims may be removed to federal district courts if diversity jurisdiction exists. 367 U.S. 348, 352, 81 S. Ct. 1570, 6 L. Ed. 2d 890 (1961). *Regions Bank* Factor Two requires the court have "competent" jurisdiction, but does not specifically require that the court using the relitigation exception to the Anti-Injunction Act have subject matter jurisdiction over the case. *Regions Bank*, 224 F.3d at 488 (citation omitted). The district court properly found that it maintained diversity jurisdiction over this case.

3. Final Judgment on the Merits Between Gunderson and First Health

Gunderson next argues that the district court erred in issuing the injunction, because "Plaintiffs in both suits must have asserted the same claim or cause of action, the federal court's underlying judgment must be 'final', [*sic*] *and the federal and state proceedings must involve identical parties.*" Gunderson then provides a citation to *Regions Bank*. Gunderson misunderstands what is required by the relitigation exception. The four factor

test outlined in *Regions Bank* does not require a final judgment on the merits between Gunderson and First Health. *Regions Bank*, 224 F.3d at 488 (citation omitted). The test does, however, require a final judgment on the merits. As discussed above, the district court issued a final judgment when it granted summary judgment in favor of Liberty Mutual. While this Court acknowledges that the grant of summary judgment was limited to a finding in favor of Liberty Mutual, we also find that First Health and its payors are in privity with Liberty Mutual for purposes of the relitigation exception. The district court specifically ruled on the validity of Provider Agreements entered into between Gunderson and First Health in its summary judgment ruling.

4. Federal Rule of Civil Procedure 65

Gunderson argues that enjoining actions against parties who are not identified (or identifiable without initiating litigation), violates the rule of specificity for injunctions. Gunderson asserts that the permanent injunction is impermissibly vague, overbroad and hard to ascertain in that it fails to name or otherwise identify the 'payors' of First Health. Rule 65(d) requires specificity; "[a]n injunction must simply be framed so that those enjoined will know what conduct the court has prohibited." *Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981). The district court correctly noted that the Provider Agreements between First Health and Gunderson required First Health to provide a payor listing to Gunderson. *Liberty Mutual*, No. 04-cv-2405, 2006 U.S. Dist. LEXIS 10278, *9 (Mem. Ruling). First Health complied with these requirements, and provided Gunderson with payor

listings. Therefore, this Court holds that the permanent injunction is framed in a manner that enables Gunderson to know what conduct the district court prohibited.

IV. CONCLUSION

For the foregoing reasons, First Health's motion to dismiss for lack of jurisdiction is DENIED. The district court's grant of a permanent injunction against Gunderson is AFFIRMED.

Footnotes

*Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

1District courts have the power to issue a narrowly tailored injunction under the All Writs Act to enjoin "repeatedly vexatious litigants from filing future state court actions." *Newby v. Enron Corp.*, 542 F.3d 463, 2008 U.S. App. LEXIS 19167, *5 (5th Cir. 2008).

2The Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits federal courts from interfering with state court proceedings. Under the statute, a United States court may not grant an injunction to stay proceedings in a state court unless it is (1) expressly authorized by Congress; (2) where necessary in aid of its jurisdiction; or (3) to protect or effectuate its judgments. The later of these three exceptions is commonly referred to as the "relitigation exception" to the Anti-Injunction Act. *See Duffy & McGovern Accommodation Servs. v. QCI*

Marine Offshore, Inc., 448 F.3d 825, 828 (5th Cir. 2006) (stating that "a federal court can enjoin state proceedings threatening to ignore an earlier, preclusive federal court order").

3Gunderson notes that before the deadline to appeal the November 2007 injunction passed, First Health timely filed an unopposed motion to amend the injunction to correct an inaccurate date. The district court then issued the January 2008 amended judgment, and in accordance to Federal Rule of Appellate Procedure 4(a)(1), Gunderson and LCMH timely filed a notice of appeal of that order.

4On May 9, 2006, Gunderson appealed the district court's grant of summary judgment. This Court dismissed the appeal for lack of jurisdiction in a *per curiam* opinion without explanation. Based on the briefs filed, this Court finds that the appeal was dismissed for lack of jurisdiction because Gunderson improperly attempted to appeal the district court's denial of a 12(b)(6) motion to dismiss. *See* Appellee's Mot. to Dismiss the Appeal for Lack of Juris. in *Liberty Mutual Insurance Co. v. Gunderson*, No. 06-30545, (5th Cir. 2006) (unpublished decision). Gunderson failed to brief the only appealable issue, the district court's grant of summary judgment in favor of Liberty Mutual, and therefore abandoned that issue on appeal.

5The findings in the other cases are irrelevant; however, this Court notes that the district court distinguished the instant case from each one of the decisions cited by Gunderson to argue that the district court lacked subject matter jurisdiction. On *de novo* review, this Court must make an independent

determination regarding subject matter jurisdiction.

DOCKET NO. 04-2405

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
LAKE CHARLES DIVISION

LIBERTY MUTUAL INSURANCE COMPANY

VS.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL

November 30, 2007, Decided
November 30, 2007, Filed

JAMES T. TRIMBLE, JR., UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE METHVIN.

MEMORANDUM RULING

Before the Court is a "Motion for Civil Contempt and Sanctions and for Permanent Injunction and Stay of Proceedings Pursuant to the All Writs Act" (doc. # 136) filed by Liberty Mutual Insurance Company ("Liberty Mutual") and a "Motion for Civil Contempt and Sanctions and for Permanent Injunction and Stay of Proceedings Pursuant to the All Writs Act" (doc. # 146) filed by First Health Group Corp. ("First Health"), wherein the movers seek to permanently enjoin defendants, Clark A. Gunderson ("Gunderson") and Lake Charles Memorial Hospital ("LCMH") from relitigating in the Louisiana state workers' compensation system those factual and legal issues actually decided by this Court's February 15, 2006

Memorandum Ruling and April 12, 2006 Amended Judgment. Liberty Mutual and First Health also seek to hold Gunderson and LCMH in contempt of this Court's "Preliminary Injunction and Stay Order" dated October 30, 2006. [1]

FACTUAL STATEMENT

For a complete recitation of the facts in this suit seethe Memorandum Ruling dated February 15, 2006. [2]

PROCEDURAL HISTORY

Pursuant to a motion for summary judgment filed by the Plaintiffs and a motion to strike filed by the defendants to this suit, [3] this Court made the following rulings: (1) the discount provisions in the Provider Agreements between First Health and Gunderson and LCMH are valid and enforceable because there are no prohibitions in the Louisiana Workers' Compensation law that prevent a provider from agreeing to charge and receive discounted rates for the services they provide to occupationally ill or injured workers, and (2) the payment provisions of the Provider Agreement between Liberty Mutual and Gunderson and LCMH are not null and void because Louisiana Revised Statute § 40.2203.1 [4] expressly states that the notice requirement provisions shall not apply to group purchasers (First Health) or to agreements of a group purchaser (payors such as Liberty Mutual who have an agreement with First Health).

By Amended Judgment dated April 12, 2006, [5] the Court directed entry of a Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Gunderson and LCMH appealed the ruling to the Fifth Circuit Court of Appeal, however, the appeal was

dismissed for lack of jurisdiction on October 6, 2006. [6] Thus, the Amended Judgment is final.

In response to Gunderson and LCMH's continued prosecution of claims under the Any Willing Provider Act, First Health filed a "Motion for Temporary Restraining Order, Preliminary and Permanent Injunction and Stay of the State Court Proceedings Pursuant to the All Writs Act" [7] on October 24, 2006. On October 30, 2006, this Court issued a Preliminary Injunction and Stay Order granting the temporary restraining order and preliminary injunction which enjoined and prevented defendants, Clark A. Gunderson, M.D. and Lake Charles Memorial Hospital "from pursuing any claim before any court arising under the Louisiana Any Willing Provider Act, La. R.S. 40:2201 et seq. against First Health Group Corporation or any Payor as set forth in the provider agreements between First Health and Defendants. . . ." The Court subsequently denied a "Motion to Vacate" filed by Defendants. [8]

LAW AND ANALYSIS

First Health's motion for an injunction and/or stay order

First Health maintains that Gunderson and LCMH actively seek to relitigate in the Louisiana state workers' compensation system issues fully litigated and decided by this Court, specifically referring to the Court's rulings that (1) Louisiana law, including the Louisiana Workers' Compensation Act, permits discounting of medical bills for treatment rendered to occupationally ill or injured workers, and (2) First

Health and its contractual payors are exempt from the notice requirements of Louisiana Revised Statute 40:2203.1(A). First Health seeks a permanent injunction and stay order under the All Writs Act [9] to enjoin Gunderson and LCMH from relitigating in the Louisiana state workers compensation system those factual and legal issues actually decided by this Court's February 15, 2006 Memorandum Ruling and Amended Judgment. First Health also seeks to hold Gunderson and LCMH in civil contempt of the October 30, 2006 Preliminary Injunction and Stay Order.

First Health complains that Defendants continue to file suit, albeit in the Office of Workers' Compensation ("OWC"), against payors that have contracted with First Health, and refuse to dismiss the actions. First Health asserts that the claims are for underpayment of medical bills which seek penalties and attorney fees for arbitrary and capricious handling of the claims. [10] First Health further asserts that each of these suits claims that the FPO contract is unenforceable under Louisiana Revised Statute 40:2203.1 (B) and (D) because of the absence of proper notice as required by the Any Willing Provider Act.

Defendants maintain that First Health is attempting to use a contract to take discounts for occupationally injured workers that was amended as of December 1, 2004 and terminated as of June 14, 2005. [11] The effect of the amended Provider Agreement was to remove workers' compensation from the contract. Even though First Health argues that the June 14, 2005 letter terminated the contract on June 1, 2006 with existing patients terminating August 1, 2006, First Health concedes that they are only seeking an injunction and

stay pursuant to the Provider Agreement that was in effect from January 1, 2000 until November 30, 2004. Be that as it may, First Health is correct in that the prior preliminary injunction only applied to claims during the time period when the governing agreement between the parties was effective which is from January 1, 2000 until November 30, 2004. Hence, any permanent injunction could only apply to claims made during this period of time.

Defendants complain that First Health "neglected to inform the Court that they had sent Dr. Gunderson a PPD contract which did not include Appendix 'A' attached to the First Health contract." [12] Thus, Defendants argue that without Appendix A attached to the contract, [13] Gunderson's contract with First Health requires payment of the Louisiana Fee Schedule under Section 4.2(e). In his affidavit, [14] Dr. Gunderson declares that "he is quite certain that the contract he executed with First Health in 2001 did not contain Appendix "A." [15] Dr. Gunderson further declares that "[a]t the time the First Health PPa contract was executed by me, one of my staff members, Leslie Zimmerman, had to call First Health to obtain the reimbursement data. This would not have been necessary if Appendix A was attached. Ms. Zimmerman was never informed by First Health that

Appendix A contained a workers' compensation PPG discount." [16] In rebuttal, First Health submits a 2001 File Maintenance Record of Dr. Gunderson that includes an application/contract checklist, a physician application signed by Dr. Gunderson, a workers compensation questionaire signed by Dr. Gunderson, a checklist for a completed application, an application

cover sheet and a contract executed by Dr. Gunderson which clearly includes Appendix "A." The application/contract checklist has marked that the record contains a "Correct Appendix A. [17] The Physician application, executed by Dr. Gunderson states that he provides workers' compensation services. [18] The workers' compensation questionaire asks the following question: "My practice is currently open to new workers' compensation patients." There is an "X" marked by the "Yes" column. This questionaire is signed by Dr. Gunderson. The checklist for a completed application states that a "**Signed** original Contract Agreement with Appendix A [is] attached." [19] The application cover sheet which reveals information found to be missing or incomplete remarks that the only document or information missing is "ME - Malpractice Experience." [20] Finally, the signed contract includes Appendix A which contains the reimbursement rates for services rendered to occupationally ill/injured employees. [21] The executed Provider Agreement provides that the "Payor shall be liable for the lesser of the Provider's billed charges or the amount set forth in Appendix A of this Agreement. . ."[22] Without Appendix A, Dr. Gunderson would not have known what his reimbursement rates would be for any services he provided. The Court finds no merit to Dr. Gunderson's allegation that First Health did not send Appendix A with the contract.

Defendants maintain that First Health is taking unauthorized discounts from a variety of workers' compensation payors who continue to take First Health PPO discounts even though there is no contract to take such a discount. Defendants submit numerous First Health PPO discounts taken by various workers'

compensation payors. [23] The Court agrees that if the payors did not have a contract with First Health during the period of time in which Dr. Gunderson had a Provider Agreement that allowed for discounting workers' compensation claim, such discounts are invalid. However, the Court agrees with First Health that out of network EOB's are irrelevant to the injunction that First Health is seeking because it would only apply to payors who had a contract with First Health during the time period Dr. Gunderson and/or LCMH had a Provider Agreement with First Health that allowed discounting for occupationally ill/injured workers.

Defendants assert that claims against many payors also include late payments either pursuant to Louisiana law and/or under the terms of the PPO contract itself. Obviously, the issue of late payment is irrelevant to the injunction being sought by First Health. Defendants are free to pursue any claims for late payment against the payors that are allegedly in violation of either Louisiana law or the PPO contract itself.

Defendants maintain that this Court cannot issue another injunction because First Health has not been made a defendant in any action by Gunderson and LCMH since the October 30, 2006 Preliminary Injunction and Stay Order. Defendants then argue that the All Writs Act only allows an injunction to be brought by someone who was actually a party to the Federal Judgment citing *Deus v. Allstate Ins. Co.* [24]

The All Writs Act authorizes federal courts "to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles

of law." [25] This power dovetails with the relitigation exception to the Anti-Injunction Act, which, although generally prohibits federal courts from enjoining state proceedings, it permits a court to enjoin a state court "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." [26]

Generally, to obtain a permanent injunction, a petitioner must show "a clear threat of continuing illegality portending immediate harmful consequences irreparable in any other manner." [27] However, to obtain an injunction under the relitigation exception to the Anti-Injunction Act, no independent demonstration of irreparable harm or lack of alternative remedies is necessary. Rather, demonstrating that the matter satisfies the prerequisites of the relitigation exception is sufficient to demonstrate both the harm of continuing the state litigation and the lack of an adequate remedy at law. [28]

The relitigation exception is grounded in principles of *res judicata* and collateral estoppel. [29] Courts apply the tests used for those doctrines to determine whether an injunction is warranted. [30] "[F]ederal law applies to determine the preclusive effect of federal judgment in federal court, even for purposes of enjoining state proceedings. [31] To determine whether res judicata precludes relitigation of a claim in a state proceeding, the Court must determine whether: (1) the parties in this action are identical to (or at least in privity [32] with) the parties in the workers' compensation actions; (2) the judgment in this action was rendered by a court of competent jurisdiction; (3) this action concluded with a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits.[33]

This Court has determined that it has jurisdiction over the matter based on complete diversity. The Court has ruled that the workers compensation act does not prohibit discounting for services rendered to occupationally injured/ill patients, and that the notice requirements of the Any Willing Provider Act are not applicable to First Health (as a group purchaser) or to payors that have an agreement with First Health. On October 12, 2006 this Court rendered a final judgment. Hence, the only question remaining is whether or not non-parties to this suit can be included within the scope of this Court's injunction and/or stay order.

Privity has been described as nothing more than a "legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion." [34] Privity exists where, for example, a party's claim is derivative of the original party's claim. [35] To the extent that a payor had a contract with First Health that allowed for discounts to be taken for an occupationally ill/injured worker during the time period in which Dr. Gunderson or LCMH and First Health had a Provider Agreement, the Court finds that privity exists between First Health and that payor which allows said payor to be included within the scope of this Court's injunction and/or stay. In other words, Gunderson and LCMH can not prosecute claims against any payor that had a contract with First Health during the time period (January 1, 2000 - November 30, 2004) in which First Health had a Provider Agreement with either Gunderson or LCMH that involves claims for underpayment for discounting services for workers compensation patients, and/or failing to comply with the notice requirement provisions of Louisiana Revised

Statute § 40.2203.1. Accordingly, in order to effectuate this Court's Memorandum Ruling of February 15, 2006 and the Amended Judgment of April, 12, 2006, First Health's motion for a permanent injunction and/or stay will be granted.

Liberty Mutual 's motion for an injunction and/or stay

Liberty Mutual also seeks to permanently enjoin Gunderson and LCMH from filing or prosecuting claims in the Office of Workers' Compensation involving issues already decided by this Court in the February 15, 2006 Memorandum Ruling and April 12, 2006 Amended Judgment. Liberty Mutual also seeks to have this Court find Gunderson and LCMH in contempt for violating the preliminary injunction dated October 30, 2006. [36]

Liberty Mutual maintains that Gunderson and LCMH have continued to file and prosecute claims against it in the OWC in direct violation of this Court's October 30, 2006 preliminary injunction and a Stay Agreement entered into between First Health and Gunderson and LCMH dated May 7, 2007. Liberty Mutual argues that the claims being sought by Gunderson and LCMH involve the same claims decided by this Court in its February 15, 2006 Memorandum Ruling and April 12, 2006 Final Judgment (the claims involve the validity and enforceability of the Provider Agreements and PPO Contracts). Thus, Liberty Mutual seeks a permanent injunction to cease the filing and prosecuting of these particular claims against it in the OWC.

Counsel for Gunderson and LCMH maintains that on August 29, 2007, he dismissed all claims that Liberty

Mutual complains about, thus a preliminary injunction is not necessary. Liberty Mutual points out that these dismissals were without prejudice, which is not enough to preclude issuance of a permanent injunction. Liberty Mutual further asserts that neither the preliminary injunction issued by this Court, nor the Stay Agreement between First Health and Gunderson and LCMH stopped these defendants from filing and prosecuting claims against it. Hence, Liberty Mutual argues that a permanent injunction is indeed necessary. Furthermore, Liberty Mutual argues that the relitigation exception has been satisfied in that res judicata or collateral estoppel would bar the subsequent state litigation. The Court finds that Liberty Mutual's argument has merit and agrees that in order to give this Court's previous Memorandum Ruling and Amended Judgment any effect at all, a permanent injunction and/or stay order is necessary.

Civil Sanctions

First Health and Liberty Mutual both seek to have this Court find that defendants, Gunderson and LCMH are in civil contempt for allegedly violating this Court's October 30, 2006 Preliminary Injunction and Stay Order. The Order stated that:

> pursuant to the All Writs Act, 28 U.S.C. § 1651(a), a temporary restraining order and preliminary injunction is hereby issued enjoining and preventing Defendants Clark A. Gunderson, M.D. and Lake Charles Memorial Hospital ("Defendants") from pursuing any claim before any court arising under Louisiana's Any Willing Provider

> Act, La.R.S. 40:2201, *et seq.* against First Health Group Corporation or any Payor as set forth in the provider agreements between First Health and Defendants, including without limitation pursuing such claims in the matter styled *Gunderson et al v. F.A. Richard, et al* ., Case No 2004-002417 currently pending in the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana.

First Health maintains that notwithstanding this Court's rulings and the preliminary injunction, Gunderson and LCMH have instituted numerous actions against Payors who have contracted with First Health in the Louisiana workers' compensation courts that directly contravene the injunction. First Health argues that the actions raise issues decided by this Courtin the February 15, 2006 Memorandum Ruling, and that Gunderson and LCMH refuse to dismiss said actions. First Health seeks to have this court impose an appropriate sanction against these defendants. First Health complains that it has received or been threatened by its payor community with numerous third party demands asserting claims for indemnification (one of these claims has been settled despite this Court's ruling). [37] First Health then complains that it has expended substantial monies defending these indemnity claims, and that more resources will be wasted unless Gunderson and LCMH are enjoined from continuing to prosecute and settle these claims.

Liberty Mutual complains that Gunderson and LCMH violated the Injunction by filing and continuing to

pursue claims against it in the OWC. Liberty Mutual seeks attorneys fees and costs for filing this motion and for litigating the OWC claims filed by defendants.

Gunderson and LCMH maintain that at the time the injunction was issued, the only claim arising out of Louisiana Revised Statute 40:2241. *et seq.* against First Health or any of its payors was the *Gunderson* suit in the 14th Judicial District Courts, and that counsel for defendants contacted that court in an effort to comply with this Court's Order. Counsel then maintains that "[t]o date, no additional suits arising under LSA-R.S. 40:2201 et seq. have been filed by LCMH and Gunderson against First Health or any payor." [38] Defense counsel argues that his filing and/or pursuing of workers' compensation claims does not violate this Court's Injunction since it does not cover workers' compensation claims and makes no mention of enjoining claims before the Louisiana OWC.

Defense counsel asserts that this Court has held that the Louisiana OWC is not a "court," but is an administrative agency. Thus, counsel argues that because the OWC is an administrative agency, by its own terms the Injunction does not apply to claims before the OWC. Liberty Mutual concedes that the OWC is not a La. Const. Art. V, § 16(A) "court" for all purposes, however, it is a "court of competent jurisdiction" for purposes of the AWPA citing *Southwest Louisiana Hospital Association, d/b/a Lake Charles Memorial Hospital v. Superior Carriers, Inc.* [39]. Given the potential for any possible ambiguity of this Court's intention regarding the Injunction that enjoined Gunderson and LCMH from filing these claims in "any court," the Court will not grant the motions for

sanctions filed by First Health and Liberty Mutual. However, the Court will broaden the scope of the permanent injunction to include any claims in any court *or administrative agency* in the State of Louisiana, and any claims that allege that the Louisiana Workers' Compensation Act prohibits discounting of medical bills for treatment rendered to occupationally ill or injured workers.

CONCLUSION

Based on the foregoing, the motions for civil contempt and sanctions and/or permanent injunction and stay of proceedings will be granted in part and denied in part. The motions for civil contempt will be denied; the motions for a permanent injunction and stay of proceedings will be granted.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 30th day of November, 2007.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

Footnotes

1 Doc. # 116.

2 Doc. # 95.

3 Does. # 70, 73, and 79.
4 The Any Willing Provider Act, La. R.S. 40:2201, *et seq.*

5 Doc. # 105.

6 Doc. # 111. Gunderson and LCMH did not appeal the merits of the ruling; they only appealed on jurisdictional grounds.

7 Doc. # 112.

8 Doc. # 128, dated December 7, 2006.

9 28 U.S.C. § 1651(a).

10 Plaintiff's Exhibit C includes the following claims: *James Broussard v. Sasol North America, Inc.*, No. 06-00896, filed on behalf of Dr. Clark A. Gunderson; *Rose Provost v. Motel 6*, No. 04-03598, filed on behalf of Dr. Clark A. Gunderson; *Lake Charles Memorial Hospital v. Turner Industries, Ltd., No. 04-46615.* First Health alleges that these claims are merely illustrative of the several hundred claims filed by Defendants that implicate the First Health agreements.

11 Defendants' Exhibits B and C.

12 Defendant's opposition, p. 6.

13 Appendix A, among other reimbursements, provides for the discounting of services far workers' compensation patients.

14 Defendants' Exhibit F.

15 Appendix A references a PPQ discount for workers' compensation and Dr. Gunderson states in his affidavit that he had the copy faxed to him from First Health.

16 Defendant's exhibit F, p. 2, §§ 5, 6.

17 Plaintiffs' Exhibit K.

18 *Id.*

19 *Id.*

20 *Id.*

21 The one page appendix also includes other reimbursement rates.

22 Plaintiff's exhibit K, p.5 § 4.2 a) **REIMBURSEMENT PROCEDURE.**

23 Defendant's exhibit E, in globo.

24 15 F.3d 506 (5th Cir. 1994)

25 28 U.S.C. § 1651.

26 28 U.S.C. § 2203.

27 *See, e.g., Posada v. Lamb County*, 716 F.2d 1066, 1070 (5th Cir. 1983).

28 *See, e.g. Ballenger v. Mobil Oil Corp.*, 138 Fed. App'x 615 (5th Cir. 2005); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 667 (5th Cir. 2003); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990).

29 *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L. Ed. 2d 127 (1988).

30 *Vasquez*, 325 F.3d at 675-76.

31 *Duffy & McGovern Accommodation Services v. QCI Marine Offshore, Inc.*, 448 F.3d 825, 830 n.16 (5th Cir. 2006).

32 *See Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1287-88 (5th Cir. 1989) (a district court may include privity of parties within the scope of its injunction).

33 *Regions Bank v. Rivet*, 224 F.3d 483, 488 (5th Cir. 2000); *N.Y. Life Ins. Co. v. Gillispie*, 203 F.3d 384, 387 (5th Cir. 2000).

34 *Southwest Airlines, Inc. v. Texas Intl' Airlines, Inc.* 546 F.2d 84, 95 (5th Cir. 1977).

35 *See Terrell v. Deconna*, 877 F.2d 1267, 1270-73 (5th Cir. 1989); *Meador v. Oryx Energy Co.*, 87 F.Supp.2d 658, 665 (E.D. Tex. 2400).

36 Doc. # 116.

37 See First Health's Exhibit G, Third Party Demand, *James Broussard v. Sasol North America, Inc.*, No. 06-00896, OWC, District 03; Exhibit H, Third Party Demand, *Lake Charles Memorial Hospital v. Albertson's*, OWC, No. 04-07455, District 03.

38 Defendants' Opposition, p. 9.

39 942 So.2d 754 (La.App. 3 Cir. 2006)

DOCKET NO. 04-2405

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION

LIBERTY MUTUAL INSURANCE COMPANY

VS.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL

February 15, 2006, Decided

JAMES T. TRIMBLE, JR., UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE WILSON.

MEMORANDUM RULING

Before the Court are three (3) motions: (1) Motion for Summary Judgment (doc. # 70) filed by First Health Group Corp., (2) Motion to Strike the Motion for Summary Judgment (doc. # 73) filed by defendants, Clark Gunderson and Lake Charles Memorial Hospital, and (3) Motion for Partial Summary Judgment (doc. # 79) filed by Liberty Mutual Insurance Co.

FACTUAL STATEMENT

Liberty Mutual entered into an agreement ("PPO Contract") with First Health Group Corporation ("First Health") whereby First Health agreed to make

available to Liberty Mutual various hospitals and medical providers. [1] Defendants, Dr. Clark Gunderson ("Gunderson") and Lake Charles Memorial Hospital ("LCMH") entered into "Provider Agreements" with First Health for the delivery of medical services at discounted rates to "Payors" [2], namely in this suit, Liberty Mutual. [3] Gunderson and LCMH have treated numerous employees of Liberty Mutual's insureds/employers in connection with workers' compensation claims. Liberty Mutual paid Gunderson and LCMH the negotiated rates in accordance with the Provider Agreements and the PPO Contract. Gunderson and LCMH, in another suit that was pending before this Court, [4] contend that the contracts they signed do not govern services provided in connection with workers' compensation claims. Gunderson and LCMH asserted in that suit that the payment provision of their Provider Agreements is null and void under the disclosure rules of Louisiana's Any Willing Provider Act, Louisiana Revised Statute 40:2203.1, because Plaintiffs (the preferred provider organizations and third party administrators) failed to comply with the statute's notice provisions. Thus, Gunderson and LCMH, assert that they are entitled to additional monies for medical services performed, in addition to statutory penalties and attorneys' fees.

Liberty Mutual filed this suit requesting that the Court enter a judgment declaring that (1) the Provider Agreements are valid and enforceable, (2) Liberty Mutual is obligated to pay Gunderson and LCMH only the negotiated rates for medical services performed, (3) Gunderson and LCMH are not entitled to be paid amounts in excess of the negotiated rates, (3) Gunderson and LCMH have no cause of action under

any law, statute, or regulation against Liberty Mutual, and (5) Gunderson and LCMH's efforts to receive additional monies violate their contracts which constitutes a breach of those contracts, entitling Liberty Mutual to damages and indemnity, including, but not limited to attorneys fees.

In its Second Amended Complaint, Liberty Mutual added as a defendant, First Health. Liberty Mutual alleges that pursuant to the PPO Contract, First Health represented and warranted that all of the PPO Contract's terms complied with applicable laws, and that "none of the activities to be performed hereunder ... are or shall be a violation of any applicable law ...." [5] Liberty Mutual maintains that pursuant to the PPO Contract, First Health agreed to "fully indemnify and hold harmless [Liberty Mutual] . . . from and against any and all claims, demands, loss damages, suits, causes of action and administrative proceedings and legal fees incurred in the defense thereof, whether in contract or in tort, arising out of or in connection with any breach of this Agreement by [First Health], or any negligent or wrongful act or omission of [First Health] ... in the performance of its duties under this Agreement." [6]

First Health filed a motion for summary judgment maintaining that because the Provider Agreements are valid and enforceable, First Health is not obligated to indemnify Liberty Mutual. Gunderson and LCMH filed a motion to strike First Health's motion for summary judgment alleging that it seeks a judgment on claims not asserted in the instant action, or alternatively, the indemnity claim against First Health should be dismissed on grounds of prematurity. Liberty Mutual filed a motion for partial summary judgment seeking a declaration against Gunderson and LCMH that the

Provider Agreements with First Health are valid and enforceable.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [7] As to issues which the non-moving party has the burden of proof at trial, the moving party may satisfy this burden by demonstrating the absence of evidence supporting the non-moving party's claim." [8] Once the movant makes this showing, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. [9] The burden requires more than mere allegations or denials of the adverse party's pleadings. The non-moving party must demonstrate by way of affidavit or other admissible evidence that there are genuine issues of material fact or law. [10] There is no genuine issue of material fact if, viewing the evidence in the light most favorable to the non-moving party, no reasonable trier of fact could find for the non-moving party. [11] If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." [12]

LAW AND ANALYSIS

Because the three instant motions are so intertwined, and for purposes of judicial efficiency, the Court will address each of the motions together. The Court will first address the issue of the validity of the Provider Agreements pursuant to Liberty Mutual's motion for partial summary judgment.

Is the payment provision of the Provider Agreements between First Health, Gunderson, and LCMH valid and enforceable?

Liberty Mutual entered into an agreement, the PPO Contract, with First Health whereby First Health agreed to make available to Liberty Mutual various hospitals and medical providers. Gunderson and LCMH directly contracted with First Health through Provider Agreements for the delivery of medical services at discounted rates. The Provider Agreements expressly state that the provider, Gunderson, "agrees to participate in a Preferred Provider Panel (PPO Plan) being created by First Health." [13] Likewise, LCMH also entered into a similar agreement with Affordable Medical Networks, [14] wherein it agreed to be a hospital provider in First Health's PPO network. [15]

Both Gunderson and LCMH agreed to provide their services through First Health's PPO network to certain "Payors", -- in this suit, Liberty Mutual -- at discounted rates. [16] Gunderson and LCMH agreed that the Payors would be liable only for the negotiated rates as set forth in the Provider Agreements. [17] Both Provider Agreements provided the negotiated discount rates for which the Payors would be liable. [18] Both Providers Agreements expressly stated the negotiated discount rates that applied to "Workers' Compensation Payors" [19] and/or "health care services rendered for occupationally ill/injured employees." [20] Both Provider Agreements obligated First Health to provide a list of "Payors" to Gunderson and LCMH. [21] Gunderson and LCMH have not alleged that First Health did not provide them with up-to-date Payor lists. Hence, Gunderson and LCMH were aware that when they treated any of Liberty

Mutual's patients, whether in connection with a regular health plan or a work related injury, the PPO Contract and Provider Agreements dictated the negotiated rates these providers would be paid.

Since joining with First Health, Gunderson and LCMH have treated numerous employees of Liberty Mutual's insureds/employers in connection with workers' compensation claims. Liberty Mutual has paid Gunderson and LCMH the negotiated rates in accordance with the Provider Agreements and the PPO Contract. These facts are undisputed.

Gunderson and LCMH contend that because they were not provided with a benefit card as required by Louisiana Revised Statute 40:2203.1, the payment provision of each Provider Agreement is null and void. The statute provides the following pertinent language:

> B. A preferred provider organization's alternative rates of payment shall not be enforceable or binding upon any provider unless such organization is clearly identified on the benefit card issued by the group purchaser or other entity accessing a group purchaser's contractual agreement or agreements and presented to the participating provider when medical care is provided. . . .

Both Liberty Mutual and First Health maintain that this provision does not apply because of the exemption from notice requirement set forth in Louisiana Revised Statute § 40:2203.1 which is as follows:

> A. Except as otherwise provided in this Subsection, the requirements of this Section

> shall apply to all preferred provider organization agreements that are applicable to medical services rendered in this state and to group [*12] purchasers as defined in this Part. ***The provisions of this Section shall not apply to a group purchaser when providing health benefits through its own networker or direct provider agreements or to such agreements of a group purchaser.*** (Emphasis added)

Gunderson and LCMH argue that because First Health does not provide health benefits through its own network -- instead, these benefits were provided by Liberty Mutual - then the exemption does not apply to the Provider Agreements. Likewise, Gunderson and LCMH also argue that because Liberty Mutual utilized someone else's network -- First Health's -- and Liberty Mutual did not have a direct agreement with either Gunderson or LCMH, the exemption does not apply. We disagree.

The purpose of the PPO statutes is to control the rising costs of providing quality health care benefits. [22] Louisiana courts have long held that a "statute should be construed so as to produce a reasonable result." [23] "The function of the courts is to interpret the laws so as to give them the meaning which the lawmakers obviously intended them to have and not to construe them so as to give them absurd or ridiculous meanings." [24]

A "group purchaser" is defined as "an organization or entity which contracts with providers for the purpose of establishing a preferred provider organization." [25] First Health is a group purchaser. The PPO Contract between Liberty Mutual and First Health is an

"agreement of [a] group purchaser [*i.e.* First Health]. Accordingly, the language of the statute is clear that the notice requirements do not apply to group purchasers when providing health benefits through their own network or ***to such agreements of group purchaser.*** This is the logical and reasonable interpretation of the statute and is in line with the Legislature's intent to contain escalating health care costs. Furthermore, and more significantly, this was the expectation of the parties when they entered into the PPO Contract and Provider Agreements.

We are further persuaded by First Health's arguments concerning the intent of the legislature that the notice provision at issue here applies to a "silent PPO" where there is no direct contract between the provider and the PPO. For example, when a PPO (such as First Health) makes an assignment to another PPO network. It is in those instances that the notice requirement provisions of Louisiana Revised Statute § 40:2203.1 become applicable because there is no direct contract between the provider and the PPO assignee.

Do the Workers' Compensation Laws prohibit discounting below the Fee Schedule?

Gunderson and LCMH maintain that Louisiana's Workers' Compensation Laws expressly prohibit the use of any contract which "operates to relieve an employer, in whole or in part, of any liability" created by the Louisiana Workers' Compensation Act. [26] Hence, they argue that the discount provision in the Provider Agreements runs afoul of the direct prohibition of such contracts in Louisiana Revised Statute 23:1033, and cannot be used by a Louisiana workers' compensation

carrier when paying a workers' compensation bill in the State of Louisiana. We disagree.

Louisiana Revised Statute 23:1033 prohibits a contract that operates "to relieve the ***employer,*** in whole or in part, from any liability created by this Chapter...." (Emphasis added). In *Jones v. General Motors Corp.*, [27] the Louisiana Supreme Court recognized that an agreement between employer and employee may waive or alter "statutorily established rights" so long as it is "clear and unambiguous." The Court also acknowledged that the Louisiana Workers' Compensation Act "is designed to benefit the injured worker" and read Louisiana Revised Statute 23:1033 to impose a "limitation on a contract which relieves the ***employer*** of *compensation* liability." [28] The Court does not find that the Provider Agreements have relieved the employer of its compensation liability, and we will not expand the literal interpretation of this statute.

In further support of this finding is the clear language of Louisiana Revised Statute 23:1034.2(E) which provides the following:

> Nothing in this Section shall prevent a health care provider from charging a fee for such care, services, treatment, drugs, or supplies that is ***less than*** the reimbursement established by the reimbursement schedule. (Emphasis added)

Furthermore, Louisiana Revised Statute 23:1203(B) provides further support for discounted or lower rates of reimbursement:

> The obligation of the employer to furnish such care, . . . is limited to the reimbursement determined to be the mean of the usual and customary charges for such care, . . . as determined under the reimbursement schedule annually published pursuant to R.S. 23:1034.2 ***or the actual charge made for the service, whichever is less.*** (emphasis added)

In summary, the Court concludes that there are no prohibitions in the Louisiana Workers' Compensation laws that prevent a provider from agreeing to charge and receive discounted rates for the services they provide to occupationally ill or injured workers.

Is First Health obligated by contract to indemnify Liberty Mutual?

In its motion for summary judgment, First Health maintains that it is not and cannot be obliged to indemnify Liberty Mutual for amounts purportedly due to defendants, Gunderson and/or LCMH, or to any other First Health contracted healthcare provider because the Provider Agreements are valid and enforceable as a matter of law and thus create no possibility for casting Liberty Mutual in liability. Under the PPO Contract, First Health agreed to the following:

> . . . to fully indemnify and hold harmless [Liberty Mutual] . . . from and against any and all *claims, demands, loss, damages, suits, causes of action and administrative proceedings* and *legal fees incurred in the defense thereof* whether in contract or in tort, arising out of or in connection with any breach of this Agreement by [First Health], or any negligent or wrongful act or

> omission of [First Health], or any negligent or wrongful act or omission of [First Health] . . . in the performance of its duties under this Agreement.

As previously held, the Court has determined that the Provider Agreements are valid and enforceable and the Workers' Compensation Laws do not prohibit discounting the providers' service fees below the Fee Schedule set forth in Louisiana Revised Statute 23:1034.2. To the extent that Liberty Mutual seeks indemnity from First Health for additional monies owed Gunderson and LCMH, First Health's motion for summary judgment will be granted as the Court has concluded that no additional monies are owed. As to Liberty Mutual's claim against Fist Health for attorney fees, however, the record establishes that Liberty Mutual made demand upon First Health for a defense and attorney fees, which First Health declined to provide. This action, though initiated by Liberty, was in response to claims being asserted against it by *Gunderson, et al*, and this Court holds that attorney fees so incurred are indemnifiable under the PPO Contract and will be awarded against First Health in this action.

Is the relief requested by First Health inappropriately before the Court?

In its motion for summary judgment, First Health seeks judgment in its favor, that it does not owe indemnity to Liberty Mutual because the Provider Agreements are valid and enforceable. In their motion to strike the motion for summary judgment, Gunderson and LCMH maintain that the motion seeks a judgment on claims not asserted in this action, or alternatively,

the claims of indemnity are premature. Gunderson and LCMH assert that the claims are not properly before the Court because *Gunderson, et al v. F.A. Richard, et al*, 2005 U.S. Dist. LEXIS 41625, Docket No. 04 CV 1242 was previously remanded back to state court due to improper removal. The *Gunderson, et al v. F.A. Richard* suit did not include Liberty Mutual as a defendant or claims of indemnity against First Health by Liberty Mutual. Furthermore, the indemnity claim is not premature. [29] Be that as it may, because the Court has decided the motion for summary judgment filed by Liberty Mutual, this motion is moot and First Health's motion for summary judgment is properly before the Court.

CONCLUSION

For the foregoing reasons, the motion for summary judgment filed by Liberty Mutual will be granted and the motion for summary judgment filed by First Health will be denied in part and granted in part. The Court concludes that the Provider Agreements are valid and enforceable and Liberty Mutual does not owe defendants, Gunderson and LCMH additional moneys, penalties or attorneys fees. Thus, First Health does not owe Liberty Mutual indemnity for any additional monies that might have been due to these defendants. However, First Health is liable to Liberty Mutual for attorney fees incurred in this action. The motion to strike the motion for summary judgment will be denied as moot.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 15th day of February, 2006.

JAMES T. TRIMBLE, JR.

UNITED STATES DISTRICT JUDGE

JUDGMENT

For the reasons set forth in the Memorandum Ruling of this date,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. # 79) filed by Liberty Mutual Insurance Co. is hereby **GRANTED** relieving Liberty Mutual of any obligation to pay defendants, Dr. Clark Gunderson and Lake Charles Memorial Hospital any additional sums.

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. # 70) filed by First Health Group, Inc., is hereby **GRANTED IN PART,** to the extent that First Health does not owe Liberty Mutual indemnity for underpayments sought by Defendants, Dr. Clark Gunderson and Lake Charles Memorial Hospital against Liberty Mutual, but **DENIED IN PART** to the extent First Health does owe indemnity to Liberty Mutual for attorney fees incurred in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Liberty Mutual has 30 days from this date to submit documentation to support its claims for attorney fees against First Health and First Health is granted 20 days thereafter to respond, after which the Court will decide the appropriate amount of the award of attorney fees.

IT IS ORDERED, ADJUDGED AND DECREED that the motion to strike (doc. # 73) filed by Dr. Clark Gunderson and Lake Charles Memorial Hospital is **DENIED** as **MOOT.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants, Gunderson and LCMH are to pay all costs of court.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 15th day of February, 2006.

JAMES T. TRIMBLE, JR.

UNITED STATES DISTRICT JUDGE

Footnotes

1 First Health's Exhibit A.

2 The First Health Provider Agreement defines a "Payor" as:

> An employer, trust fund, insurance carrier, health care service plan, trust, nonprofit hospital service plan, a governmental unit, any other entity which has an obligation to provide medical services or benefits for such services to Participating Patients, or any other entity which has contracted with First Health to use First Health's PPO Plan.

3 First Health's Exhibits B and C.

4 *Clark Gunderson, M.D., et al v. F.A. Richard & Associates, Inc., et al,* 2005 U.S. Dist. LEXIS 41625, Docket No. 04 CV 1242; on March 23, 2005, this Court ordered remand of the suit to state court.

5 Seconded Amended Complaint, P58.

6 Seconded Amended Complaint, P59.

7 Fed. R.Civ. P. 56(c).

8 *Vera v. Tue*, 73 F.3d 604, 607 (5th Cir. 1996).

9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

10 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

11 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

12 *Anderson*, 477 U.S. at 249-50.

13 Plaintiff's Exhibit B, P1.5.

14 First Health is a successor in interest to Affordable Medical Networks, Plaintiffs Exhibit C, entitled "Amendment to the Contract between Lake Charles Memorial Hospital Lake Charles, Louisiana and The *Affordable* Medical Networks."

15 Plaintiff's Exhibit C, PP1.5, 1.9, 3.1.

16 Plaintiff's Exhibit B, P2.8; Plaintiff's Exhibit C, P3.1.

17 Plaintiffs Exhibit B, P4.2; Plaintiffs Exhibit C, P Article 4.

18 Plaintiffs Exhibit B, Appendix A; Plaintiffs Exhibit C, Appendix A.

19 Plaintiffs Exhibit B, Appendix A, PD.

20 Plaintiffs Exhibit C, Appendix A, p.1.

21 Plaintiff's Exhibit B, P1.5 (". . . First Health will supply Provider [Gunderson] with list of all Payors that have entered into Agreements with First Health to utilize Provider's services."); Plaintiff's Exhibit C, P3.12 ("AFFORDABLE [First Health] shall periodically provide Contract Hospital [LCMH] with an up-to-date-list of all Payors and shall promptly advise Contract Hospital, in writing, of any changes in the Payor list.")

22 La. R.S. 40:2201.

23 *Bradford v. Louisiana Public Service Comm'n.*, 189 La. 327, 338, 179 So. 442 (1938); *Louisiana Municipal Ass'n. v. State*, 893 So.2d 809, 864 (La.2005).

24 *Webb v. Parish Council of Parish of East Baton Rouge*, 217 La. 926, 47 So.2d 718, 720 (1950); *Savoie v. Rubin*, 2001-3275 (La. 6/21/02), 820 So.2d 486, 488.

25 La. R.S. 40:2202(3).

26 La. R.S. 23:1033.

27 2003-1766 (La. 4/30/04), 871 So.2d 1109.

28 *Id*

29 *See Burns v. McDermott, Inc.*, 665 So.2d 76, 79 (La.App. 1st Cir. 1995)(although fault had not yet been determined, demand for indemnification of attorneys' fees pursuant to indemnity provision was not

premature); *Celestine v. City of Lake Charles*, 534 So.2d 146, 148 (La.App. 3d Cir. 1988)(issue of liability need not be determined before obligations under indemnity provisions of agreement can be fixed). Also, as noted by Liberty Mutual, this presumes that Louisiana law will apply. The PPO Contract does expressly state that Illinois law applies.

No. 08-30075 Summary Calendar
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee

v.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL, Defendants-Appellants

January 12, 2009

Appeal from the United States District Court for the Western District of Louisiana. USDC No. 2:04-CV-2405.

ON PETITION FOR REHEARING

Before STEWART, OWEN, and SOUTHWICK, Circuit Judges .

PER CURIAM :*

The Petition for Rehearing is DENIED .

We write further because of the Appellants' suggestion that the Louisiana Supreme Court's recent case in Broussard Physical Therapy v . Family Dollar Stores, Inc., 2008-cc-1013 (La . Sup . Ct. 2008), strips this court of jurisdiction over the instant case. While the Louisiana Supreme Court's decision is

important to some of the issues raised in this litigation, the opinion is not relevant to the present appeal . Issues addressed in Broussard concerning the authority of the Office of Workers' Compensation are not before us, though they apparently were the subject of an earlier order of the district court . Because nothing in Broussard affects our finding in this appeal that there was diversity jurisdiction over the instant case, we deny rehearing . We also reject the Appellants' characterization of the holding in Horton v. Liberty Mutual Insurance Co., 367 U .S . 348 (1961) . Under Horton, even if a state agency may ultimately have authority to consider claims or aspects of those claims in the first instance, this Court may properly exercise diversity jurisdiction over state worker's compensation cases. Id. at 350, 352 .

Footnote

*Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Filed 2/15/2006
DOCKET NO. 04-2405

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
LAKE CHARLES DIVISION

LIBERTY MUTUAL INSURANCE COMPANY

VS.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL

JUDGMENT

For the reasons set forth in the Memorandum Ruling of this date,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. #79) filed by Liberty Mutual Insurance Co. is hereby GRANTED relieving Liberty Mutual of any obligation to pay defendants, Dr. Clark Gunderson and Lake Charles Memorial Hospital any additional sums.

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. #70) filed by First Health Group, Inc., is hereby GRANTED IN PART, to the extent that First Health does not owe Liberty Mutual indemnity for underpayments sought by Defendants, Dr. Clark Grunderson and Lake Charles Memorial Hospital against Liberty Mutual, but DENIED IN PART to the extent First Health does owe indemnity to Liberty Mutual for attorney fees

incurred in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Liberty Mutual has 30 days from this date to submit documentation to support its claims for attorney fees against First Health and First Health is granted 20 days thereafter to respond, after which the Court will decide the appropriate amount of the award of attorney fees.

IT IS ORDERED, ADJUDGED AND DECREED that the motion to strike (doc. #73) filed by Dr. Clark Gunderson and Lake Charles Memorial Hospital is DENIED as MOOT.
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants, Gunderson and LCMH are to pay all costs of court.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 15th day of February, 2006.

JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

Filed: 1/4/2008
DOCKET NO. 04-2405

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,
LAKE CHARLES DIVISION

LIBERTY MUTUAL INSURANCE COMPANY

VS.

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL

AMENDED JUDGMENT PERMANENT INJUNCTION AND STAY ORDER

IT IS ORDERED, ADJUDGED AND DECREED that the motions for civil contempt and sanctions and or permanent injunction and stay of proceedings pursuant to the All Writs Act (docs. #136 and 146) are hereby GRANTED IN PART and DENIED IN PART, The motions for civil contempt and sanctions are hereby DENIED; the motions for a permanent injunction and stay order are hereby GRANTED: pursuant to the All Writs Act, 28 U.S.C. § 1651(a), a permanent injunction and stay order is hereby ISSUED (1) enjoining Lake Charles Memorial Hospital ("LCMH") from pursuing any claims before any court or administrative agency in the State of Louisiana against Liberty Mutual Insurance Company and First Health Group Corp. and/or its payors which alleges that the Provider Agreements during the period from January 1, 2000 through November 30, 2004 between First Health and LCMH are invalid and/or unenforceable because they

run afoul of the Louisiana Workers' Compensation law, or, are null and void because LCMH was not provided with a benefit card as required by Louisiana Revised Statute 40:2203.1; and (2) enjoining Dr. Clark Gunderson from pursuing any claims before any court or administrative agency in the State of Louisiana against Liberty Mutual Insurance Company and First Health Group Corp. and/or its payors which alleges that the Provider Agreements, during the period from February 1, 2002 through June 1, 2006, and for participating patients, during the period from February 1, 2002 through July 30, 2006,[1] between First Health and Dr. Gunderson are invalid and/or unenforceable because they run afoul of the Louisiana Workers' Compensation law, or, are null and void because Dr. Gunderson was not provided with a benefit card as required by Louisiana Revised Statute 40:2203.1.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 4th day of January, 2008

JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

Footnote

1 Paragraph 5.2 of the agreement provides for a sixty (60) day post-termination run-off period for established patients. Exhibit K, p. 7, attached to the Motion for Civil Contempt and Sanctions and for Permanent Injunction and Stay of Proceedings Pursuant to the All Writs Act.

Filed 06/04/2008
DOCKET NO. 06-570
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA LAKE CHARLES DIVISION

SENTRY INSURANCE, MUTUAL COMPANY

v.

SOUTHWEST LOUISIANA HOSPITAL ASSOCIATION d/b/a LAKE CHARLES MEMORIAL HOSPITAL AND . DALE BERNAIJER, MD

MEMORANDUM RULING

Before the Court is "Defendants" Motion to Dismiss for Lack of Subject Matter Jurisdiction" (doc. #70) filed by Southwest Louisiana Hospital Association d/b/a Lake Charles Memorial Hospital ("LCMH") and R. Dale Bernauer, M.D. ("Dr. Bernauer") wherein the movers seek to dismiss the claims of plaintiff, Sentry Insurance, Mutual Company ("Sentry") against both LCMH and Dr. Bernauer because of lack of subject matter jurisdiction. Also before the Court is a "Motion to Enter Final Judgment'" wherein Sentry moves this Court to enter a final judgment pursuant Federal Rule of Civil Procedure 54(a) the Judgment rendered on September 5, 2007.[1]

FACTUAL STATEMENT

A recitation of the facts in this matter was stated in this Court's Memorandum Ruling[2] dated July 7, 2006 and will not be restated herein

LAW AND ANALYSIS

A motion for lack of subject matter can be raised at any time.[3] Defendants maintain that the claims asserted by Sentry should be dismissed because the amount its controversy as to each defendant does not meet the jurisdictional amount, and/or because the Louisiana Office of Workers' Compensation has original, exclusive jurisdiction over these claims and removal of such claims is prohibited by 28 U.S.C. § 1445(c). Defendants make the following argument: LCMH brought claims against Sentry in the Louisiana Workers Compensation Court ("OWC") seeking under payment and late payment of medical bills rendered to workers' compensation claimants, as well as penalties and attorney's fees provided by La. R.S. 23:1201 (F). These claims were filed prior to Sentry's initiation of the instant declaratory action. As an affirmative defense to the claims, Sentry asserted that it was entitled to access certain alleged PPO provider contracts between the providers and First Health. Defendants suggest that if Sentry obtains a favorable ruling in this matter, this Court will be asked to enjoin Defendant's OWC claims. Because Sentry's affirmative defense in the OWC case is the same issue in the instant matter, Sentry's declaratory action is effectively an attempt to remove those issues to Federal Court which is prohibited by 28 U. S. C. § 1445 (c).

In opposing the motion to dismiss, Sentry reminds the Court of its ruling in Liberty Mutual v. Dr. Clark Gunderson and Lake Charles Memorial Hospital,[4] wherein we held that the Federal Court had jurisdiction over the matter based on diversity of citizenship, citing Horton v. Liberty Mutual Ins. Co.[5]

and St. Paul Ins. Co. v. Trejo.[6] However, in the Liberty Mutual case, the plaintiff asserted breach of contract faints and alleged that Louisiana Revised Statute 40:2203.1(B) violated the Contract Clause of the United States Constitution. We expressly recognized the limited jurisdiction of the OWC with regards to these claims and held that we were not divested of jurisdiction based on Horton, supra and Trejo, supra. We also refused to abstain under the Younger doctrine based on that our finding that the OWC was not an adequate forum to hear the claims raised in Liberty Mutual's complaint - specifically, the contractual and constitutional claims.

In the instant natter, there are no claims for breach of contract or constitutional violations. Thus, we must conclude that to allow this Court to rule on the exact same issues currently pending before the OWC between the same parties would indeed be in violation of 28 U.S.C. § 1445(c) and would effectively be the same as allowing Sentry to remove the OWC lawsuit to Federal Court. However, this does not apply to Dr. Bernauer because he had no claims filed in the OWC prior to the instant declaratory action being filed.

Dr. Bernauer maintains that the claims Sentry has asserted against him should be dismissed because they do not meet the requisite $75,000.00 jurisdictional amount. Dr. Bemauer argues that the amount in controversy between Sentry and Dr. Bernauer as of the date of filing is considerably less than 575,000.00 because Dr. Bernauer has never filed any claims in the OWC against Sentry. Sentry maintains that the amounts that it has pled to its Complaint clearly exceeds $75,000.00. The test for jurisdictional amount in

a declarator action is the "total value of the right to be protected or the injury to be prevented,"[7] Sentry alleges in its Complaint that from February 2, 2003 through January 11, 2006, Dr. Bemauer submitted approximately 74 bills that were subject to a $6,600.00 discount pursuant to Dr. Bemauer's contract with First Health. Each claim is subeject to up to a $2,000.00 penalty plus attorney's fees pursuant to La. R.S. 23:1201(F)[8] Furthermore, Sentry could be subject to penalties of twice the billed charges ($ 51,022.00) or $ 50 per day, per claim pursuant to La. R.S. 40:2203. 1 et seq., under the Louisiana Any Willing Provider Act.[9] At $50 per day, the amount of penalty pursuant to La. R.S. 40:2203.1 per claim could be $18,250.00 per year.fn10 The Court finds that Sentry has sufficiently pled an amount in excess of $75,000.00. The Court further directs entry of a final judgment as to the Judgment rendered on September 5, 2007 to the extent that it pertains to Dr. Bernauer.

CONCLUSION

Based on the foregoing, thc motion to dismiss will bc granted in part and denied in part. The motion will be granted to the extent that Southwest Louisiana Hospital Association d/b/a Lake Charles Memorial Hospital will be dismissed for lack of jurisdiction; otherwise, the motion will be denied. The motion to enter final judgment will be granted in part and denied in part, the motion will be granted and the Court wilt direct entry of final judgment as to the Judgment rendered on September 5, 2007 to thc extent it pertains to Dr. Bernauer, otherwise the motion is denied.

THUS DONE AND SIGNED in Chambers at Lake

Charles, Louisiana, this 4th day of June, 2008,

Footnotes

1 Doc. #65.

2.Doc. #25.

3 Fed. R. Civ. P. 12

4 Civ. Action No. 04-2405

5 367 U.S., 348, 350-54 (1961).

6 39 F,3d 585, 588 (5th Cir. 1994).

7 Leininger v. Leininger,705 F. 2d 727, 729 (5th Cir. 1983).

8 Complaint, Par. 13

9 Id.

10 Id.

No. 08-1300

Supreme Court, U.S.
FILED
JUN 22 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DR. CLARK GUNDERSON AND
LAKE CHARLES MEMORIAL HOSPITAL,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

JUDY Y. BARRASSO
Counsel of Record
EDWARD R. WICKER, JR.
STEPHEN L. MILES
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER, L.L.C.
909 Poydras Street, Suite 2400
New Orleans, LA 70112
Telephone: (504) 589-9700
Facsimile: (504) 589-9701
Attorneys for Respondent, Liberty Mutual Insurance Company

June 22, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.6 DISCLOSURE STATEMENT

Respondent, Liberty Mutual Insurance Company, is wholly owned by Liberty Mutual Group, Inc. LMHC Massachusetts Holdings, Inc. wholly owns the stock of Liberty Mutual Group, Inc. Liberty Mutual Holding Company, Inc. wholly owns the stock of LMHC Massachusetts Holdings, Inc. No publicly traded entity owns any stock of any of these entities.

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LIBERTY MUTUAL'S BRIEF IN OPPOSITION

Liberty Mutual Insurance Company[1] requests that this Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the Opinion of the Court of Appeals for the Fifth Circuit, Docket No. 08-30075, which summarily affirmed the Judgment of United States District Court Judge James Trimble of the Western District of Louisiana, Docket No. 04-2405.

STATEMENT OF JURISDICTION

This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254(1), because there neither is an important federal question involved nor does the Fifth Circuit's opinion or that of the District Court conflict with any decision of this Court. *See* Supreme Ct. R. 10(a) and (c). Moreover, as discussed herein, Lake Charles Memorial Hospital and Clark Gunderson, M.D. ("Petitioners") seek to have this Court resolve issues that were not determined by, or even raised before, the Fifth Circuit. These issues should not be reviewed by this Court in the first instance. The Petition should be denied on this basis alone.

[1] Hereinafter, Liberty Mutual Insurance Company, Respondent herein, will be referred to as Liberty Mutual.

STATEMENT OF THE CASE

1. Statement of the Facts

In January 2001, Liberty Mutual entered into an agreement with First Health Group Corp. ("First Health"), whereby First Health agreed to make available to Liberty Mutual various hospitals and medical providers ("PPO Contract"). Those hospitals and medical providers, including the Petitioners here, entered into Provider Agreements[2] with First Health for the delivery of medical services at discounted rates to insureds/customers of Liberty Mutual. The organization resulting from the various Provider Agreements is commonly referred to as a Preferred Provider Organization ("PPO"). The discounted medical services include, but are not limited to, services on account of work-related injuries sustained by employees of the insureds/employers of Liberty Mutual.

Specifically, the Petitioners agreed in their Provider Agreements to accept the reimbursement amounts as payment in full for medical services, including medical services performed in connection with workers' compensation claims. Although for years the Petitioners reaped the benefits of the Provider Agreements and were paid by Liberty Mutual without objection the bargained-for, discounted rates in accordance with the Provider

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[2] Liberty Mutual is a third party beneficiary to the Provider Agreements.

Agreements and the PPO Contract, the Petitioners sought additional monies for their services, penalties, and attorneys' fees, and have asserted a barrage of claims against Liberty Mutual with the Louisiana Office of Workers' Compensation ("OWC") arising out of alleged underpayments. Despite the clear language of their Provider Agreements, the Petitioners contend that the payment provision of their Provider Agreements is null and void under the Any Willing Provider Act, La. Rev. Stat. 40:2201 *et seq.* (hereinafter "Title 40"), and Louisiana's workers' compensation laws, and that they are entitled to additional monies for medical services on workers' compensation claims, together with penalties and attorneys' fees.

2. Course of Proceedings and Disposition in the Courts Below

In light of the Louisiana OWC claims brought by the Petitioners and the threat of many others, Liberty Mutual, on November 23, 2004, instituted this declaratory judgment and breach of contract action against the Petitioners, seeking to have the Petitioners honor their own Provider Agreements, and to recover damages for their failure and refusal to do so. Liberty Mutual also alleged violations of the United States Constitution.[3] Liberty Mutual then sought

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[3] The constitutional claims are that (1) application of Title 40, as interpreted by the Petitioners, to Provider Agreements entered into before Title 40's enactment effectively nullifies such contracts in violation of the Contracts Clause, U.S. Const. art. I,

(Continued on following page)

summary judgment declaring that the Provider Agreements were enforceable under Louisiana law, and therefore neither of the Petitioners was entitled to be paid additional sums under the contracts, nor penalties and attorneys' fees. On February 15, 2006, the District Court granted Liberty Mutual's Motion for Summary Judgment, enforcing the Provider Agreements of the Petitioners, and finding meritless their arguments that the agreements were invalid under Title 40 or under Louisiana workers' compensation laws. The District Court certified this ruling for immediate appeal on April 12, 2006. Rather than argue the merits of the summary judgment, the Petitioners instead chose to raise only jurisdictional (and abstention) issues in the Fifth Circuit, which correctly dismissed the appeal on October 3, 2006.

In spite of the District Court's summary judgment, the Petitioners continued to file and pursue claims against Liberty Mutual in the Louisiana OWC seeking alleged underpayments, penalties, and attorneys' fees. On the motion of both Liberty Mutual and First Health, the District Court, on November 30, 2007, enjoined the Petitioners from bringing and/or pursuing claims against First Health, including those

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§ 10; and, (2) imposition of the penalties imposed by Title 40 – fifty dollars per day *ad infinitum* regardless of the alleged compensatory damages, which are minimal in most cases – would be in violation of the Due Process Clause of the Fourteenth Amendment pursuant to *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-83 (1996).

payors/insurers with whom it contracted, like Liberty Mutual, involving the enforceability of the Provider Agreements. The Petitioners appealed only a limited portion of that ruling, choosing not to contest the injunction in favor of Liberty Mutual; the Petitioners specifically limited their appeal to the injunction in favor of First Health. Pet. at 8a. The Fifth Circuit affirmed the District Court's injunction on November 25, 2008. *Id.* On the Petitioners' motion for panel rehearing, the Fifth Circuit clarified that it had subject matter jurisdiction due to diversity of citizenship. It found that, pursuant to *Horton v. Liberty Mutual Insurance Company*, 367 U.S. 348 (1961), "even if a state agency may ultimately have authority to consider claims or aspects of those claims in the first instance, this Court may properly exercise diversity jurisdiction over state worker's compensation cases." Pet. at 52a. The Petition followed.

REASONS FOR DENYING THE WRIT

1. Subject Matter Jurisdiction Exists For Liberty Mutual's Claims.

The Petitioners' first and primary argument is an attack on the lower courts' subject matter jurisdiction, based on a claim that Liberty Mutual violated 28 U.S.C. § 1445(c) when it "effectively removed" workers' compensation cases "pending against it" to federal court by "asserting its affirmative defenses in the form of a federal declaratory

action." Pet. at 13. The argument is founded on an erroneous belief that cases having anything at all to do with workers' compensation issues must be heard in a workers' compensation forum, and not by federal courts. As such, and because subject matter jurisdiction exists for Liberty Mutual's claims, review is not warranted.

The starting point for determining the scope of the jurisdiction conferred upon federal courts is the jurisdictional statutes themselves. *See* 28 U.S.C. § 1330, *et seq*. Notably, although the jurisdictional statutes do limit the federal courts' original jurisdiction over state tax and ratemaking issues, *e.g.*, 28 U.S.C. §§ 1341-42, the statutes nowhere limit the federal courts' original jurisdiction over workers' compensation claims. It follows that federal courts retain original jurisdiction in diversity cases, even though they involve workers' compensation claims. Indeed, this Court has agreed, expressly holding that original federal jurisdiction is not precluded because a case involves a workers' compensation award. *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 350-54 (1961). Relying on the jurisdictional statutes, this Court in *Horton* held that a federal court had original jurisdiction over a case challenging a workers' compensation award and requiring a *de novo* determination in federal court of the amount to be awarded because the statutes did not expressly preclude such jurisdiction. *See id.* The Court explained:

> Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth. Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as removal of such suits, and it could easily do so still.

Id. at 352. Because Liberty Mutual's claims against the Petitioners meet the diversity of citizenship and amount in controversy requirements – a point no longer in dispute – the Fifth Circuit and District Court correctly applied *Horton* and found original jurisdiction over this case involving the enforceability of the Provider Agreements and PPO Contract, even though the case also involves workers' compensation laws.[4]

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[4] The Petitioners' view of *Horton* is unclear. In one instance, they assert that the present case is "distinguishable" from *Horton* (Pet. at 15), and, in another, that application of *Horton* here would improperly "[e]xpand[ ] its holding" (*id.* at 16). In still another instance, they cite approvingly the *Horton* dissent, suggesting that the case should be overturned (*id.* at 17). No matter the Petitioners' view, the holding of *Horton* that federal

(Continued on following page)

In the face of these controlling precedents, the Petitioners solely turn to non-controlling, unpersuasive authorities. For example, *Dial*[5] and *Hedrick*[6] (Pet. at 16-17) involve the requirement in certain cases of exhaustion of administrative remedies in the OWC, but that is not an issue in this lawsuit. Moreover, *Ryder*[7] (*id.* at 18) ignored the controlling Supreme Court authority expressly holding that a federal court does have original jurisdiction over a workers' compensation claim, and concluded to the contrary. In so holding, the *Ryder* court relied upon the argument that the prohibition in 28 U.S.C. § 1445(c) against removal of workers' compensation claims translates into a prohibition against the exercise of original jurisdiction, an argument flatly rejected by this Court in *Horton*. The Fifth Circuit and District Court correctly refused to defer to *Ryder* and the other cases cited by the Petitioners.

The Petitioners' argument against federal jurisdiction also fails because Liberty Mutual's claims

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courts have original jurisdiction over cases involving workers' compensation laws, which is based on sound statutory interpretation, remains on strong footing and is applicable to this case, especially given that the existence of diversity jurisdiction is no longer in dispute.

[5] *Dial v. Hartford Accident & Indem. Co.*, 863 F.2d 15 (5th Cir. 1989).

[6] *Hedrick ex rel. Adams v. Tex. Workers Compensation Comm'n*, 54 Fed. Appx. 592 (5th Cir. 2002) (per curiam).

[7] *Ryder Servs. Corp. v. Savage*, 945 F. Supp. 232 (N.D. Ala. 1996).

could not have been brought in the OWC; accordingly, they were not, and could not have been, "effectively removed," as the Petitioners contend. The Louisiana OWC has jurisdiction only to "adjudicate workers' substantive claims." *See* La. Const. art. V, § 16(A); *see also Albe v. La. Workers' Compensation Corp.*, 700 So. 2d 824, 829 (La. 1997) (Louisiana Constitution only authorizes OWC to "adjudicate workers' substantive claims arising under the [Workers' Compensation] Act"). Here, Liberty Mutual's breach of contract claim is not a "workers' substantive claim." Indeed, no workers are even parties to the action. Nor is this case merely a declaratory judgment action concerning claims currently pending in the OWC. To the contrary, Liberty Mutual brought claims for breach of contract, as well as for constitutional violations, which the Petitioners conveniently omit from their Petition. The OWC has no jurisdiction to hear either claim. *See Tomas v. Conco Food Distribs.*, 666 So. 2d 327, 330 (La. App. 3d Cir. 1995) (OWC has no authority to hear claims of constitutional violations); *see also* La. Rev. Stat. 23:1310.3(E) (conferring OWC jurisdiction over certain "claims or disputes" arising out of the Workers' Compensation Act, but not over breach of contract claims by insurers against providers).[8]

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[8] The Petitioners' reference to *Sentry Ins. Co. v. Southwest La. Hosp.*, No. 06-570 (W.D. La. 06/04/08) – and claim that the District Court somehow had a "change of heart" on *Horton* in that case (Pet. at 18-19) – is misleading. In *Sentry*, the District

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Further, Liberty Mutual seeks a declaration concerning Title 40, which heaps ruinous penalties upon those found to be "group purchasers," as statutorily defined, when they fail to issue so-called benefit cards or provide written notice that a medical bill will be discounted pursuant to a PPO agreement. The OWC has no jurisdiction to hear such a claim. *See Gunderson v. F.A. Richard & Assocs., Inc.*, 977 So. 2d 1128, 1135-36 (La. App. 3d Cir.) ("[W]e now hold that a claim brought pursuant to La. R.S. 40:2203.1 for failure to comply with provisions of that statute arises out of [Title 40] and not the [Workers Compensation Act]. . . . As with all other civil or criminal matters not specifically excepted by either the constitution or legislation, original jurisdiction of such claims lies properly with the district court."), *writs denied*, 992 So. 2d 953 (La. 2008). That Title 40 claims cannot be heard in the OWC is confirmed by the actions of the Petitioners themselves, who have prosecuted such a claim in Louisiana district court – not the OWC – against First Health, also a party to this case. The Petitioners should not be heard to argue that their dispute with Liberty Mutual can only be considered in the OWC, while at the same

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Court expressly distinguished the jurisdictional issues present in the instant case, given that both cases contain different causes of action. Pet. at 59a. In any event, the District Court's finding in *Sentry*, which has not even been reviewed by the Fifth Circuit, does not require this Court to provide "guidance . . . on this [*Horton*] issue." Pet. at 19.

time they litigate the same claims in a Louisiana district court.

Because the Title 40, constitutional, and contract damages claims in this action cannot be brought in the OWC,[9] those claims never were, or even could have been, "removed" from the OWC by Liberty Mutual.[10] Under *Horton*, as the Fifth Circuit and District Court properly held, federal jurisdiction is proper over this lawsuit.

2. The Petitioners' Abstention Argument Is Waived And Does Not Warrant Review.

The Petitioners next contend that the District Court "lacked authority to render the summary judgment under policies of federalism embodied in

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[9] Because the OWC lacks jurisdiction to hear central claims in this lawsuit, the Petitioners' reliance on *Kay v. Home Indem. Co.*, 337 F.2d 898 (5th Cir. 1964), which they claim requires the OWC to make an "ultimate authoritative determination" in certain circumstances, should be ignored. Pet. at 17.

[10] By the same token, Liberty Mutual's declaratory judgment action concerns the validity of the very contracts themselves, as well as all pending *and potential* claims by the Petitioners related to discounts on medical bills taken pursuant to the Provider Agreements and PPO Contract, which claims have been or will be filed by the Petitioners in the future. Suits that have been threatened but that have not been filed may properly be the subject of a declaratory judgment action, *see Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172, 176 (1965) (one need not await the filing of a threatened suit to seek relief under the Declaratory Judgment Act), but obviously cannot be removed.

the Anti-Injunction Act." Pet. at 20. The flaws in this argument are myriad.

First, the Petitioners have lost track of the issues presented below. Pursuant to the statutory grant of appellate jurisdiction for interlocutory review of permanent injunctions, *see* 28 U.S.C. § 1292(a)(1), the Petitioners sought review of an order permanently enjoining them from bringing claims against First Health or its payors, including Liberty Mutual. The Petitioners, however, did not appeal the injunction with respect to Liberty Mutual, choosing instead to limit their appeal to the injunction as to First Health and its other payors. The Fifth Circuit made this fact clear in its ruling. *See* Pet. at 2. (Petitioners only appealed "portion of injunction which enjoins claims against First Health and its 'unidentified payors,'" and did "not appeal the permanent injunction applicable to claims against Liberty Mutual"). Since the Petitioners chose not to appeal the injunction with respect to Liberty Mutual in the Fifth Circuit, they cannot now raise the issue in this Court. *See, e.g.*, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 n.5 (1985) (issues not raised below are waived).

Moreover, just as the Fifth Circuit never considered the injunction with respect to Liberty Mutual, the Fifth Circuit also never considered the underlying basis of the injunction – *i.e.*, the summary judgment in favor of Liberty Mutual years earlier by the District Court on legal issues involving Louisiana law. *See* Pet. at 34a. The summary judgment was rendered on February 15, 2006 (*id.*), and the District

Court certified the legal issues for immediate appeal. App. 1. Rather than appeal the merits of the summary judgment, the Petitioners instead chose to raise only jurisdictional (and abstention) issues in the Fifth Circuit, which correctly dismissed the appeal on October 3, 2006. App. 4. These events were long before the District Court issued its permanent injunction in November 2007 (Pet. at 17a) and the Fifth Circuit affirmed in November 2008. *Id.* at 1a.

Accordingly, the Petitioners' complaints to this Court regarding the propriety of the summary judgment are improper because the Fifth Circuit never considered – or was even asked to consider – the summary judgment. The Petitioners' complaints regarding abstention are equally improper because such arguments never were presented by the Petitioners to the Fifth Circuit as part of their appeal of the permanent injunction that is at issue here. *See Hallie*, 471 U.S. at 42 n.5.[11] Petitioners' abstention arguments should not be considered.

Even if Petitioners' arguments are considered, they do not meet this Court's considerations governing review on certiorari. The Petitioners argue not that any Supreme Court precedent was ignored, but that the District Court did not properly follow the

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[11] The District Court and Fifth Circuit instead considered whether an injunction was proper pursuant to the All Writs Act, 28 U.S.C. § 1651, and under the re-litigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. The Fifth Circuit's ruling in this regard is not challenged by Petitioners.

Fifth Circuit's standard for determining the propriety of abstention under *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590-91 (5th Cir. 1994), which sets forth factors for consideration whether abstention is proper in a declaratory judgment action. There also is no contention that this ruling created a conflict in the circuits. Nor is this issue an important one that has never been decided by this Court. As such, the issue presented plainly does not meet any of the considerations governing review on certiorari. *See* Sup. Ct. R. 10. Review should not be granted. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.* 349 U.S. 70, 73-74 (1955) (Court will only grant review where there are "special and important reasons" to do so).

Finally, review also is not warranted because the District Court correctly applied the *Trejo* factors in concluding abstention was improper. These factors include (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated; (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; (3) whether the plaintiff engaged in forum shopping; (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence exist; (5) whether the federal court is convenient for the parties and witnesses; (6) whether retaining the lawsuit would serve the purposes of judicial economy; and, (7) whether the federal court is called upon to construe a judicial decree entered by a state court. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 388

(5th Cir. 2003) (citing *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590-91 (5th Cir. 1994)).

Here, none of the factors supports abstention. As to factor one, *Trejo* requires there be a state forum where "all of the matters in controversy may be fully litigated." *Id.* As stated previously, the OWC does not have jurisdiction to hear disputes regarding Title 40, the constitutional claims, or the breach of contract claim. *See* p. 10, *supra*. As such, there is no pending state case that could hear the issues presented. As to factors two through four, this case is not the kind that presents impermissible or unfair forum shopping. Rather, quite simply, Liberty Mutual has sought a ruling regarding the application of Title 40 and the enforceability of Provider Agreements in a forum where standard diversity principles confer jurisdiction. Nothing about this action should be construed as improper. *See, e.g.*, *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998) (insurance company properly initiated declaratory judgment suit to ascertain its rights); *State Farm Fire & Cas. Co. v. Odom*, 799 F.2d 247, 250 n.1 (6th Cir. 1986) (same).

Nor should this case have been dismissed because of judicial efficiency concerns. As set forth above, the dispute presented by Liberty Mutual cannot be heard in the OWC. To be sure, dismissing this case would have been inefficient because it would deprive Liberty Mutual of the four-plus years of effort that has been expended in this case, and potentially would result in the filing of additional suits to

adjudicate the Title 40 issues. As well, the Petitioners' claim that this case and the OWC cases may result in inconsistent judgments rings hollow in light of the Petitioners' recently filed counterclaims in this case joining issues regarding PPO underpayments. The Providers themselves obviously believe that all issues can be determined by this Court, thus alleviating the possibility of inconsistent rulings.

There is no merit to the Petitioners' abstention argument, and review of this case is not warranted.

3. The Petitioners' Due Process Rights Were Not Infringed.

Finally, the Petitioners argue that their due process rights somehow were violated because the District Court's injunction prohibits them from pursuing claims against "First Health's 'payors.'" Pet. at 26. In particular, the Petitioners contend, in conclusory fashion, that the prohibition against virtual representation in *Taylor v. Sturgell*, ___ U.S. ___, 128 S. Ct. 2161 (2008), was violated through the Fifth Circuit's finding that First Health's payors were in privity with Liberty Mutual and/or First Health, because Liberty Mutual did not sue the Petitioners on behalf of the unidentified payors in the First Health network in whose benefit the injunction was issued, and because the Petitioners did not receive notice that the payors would be included in the judgment in favor of Liberty Mutual.

Again, since the Petitioners chose to challenge the injunction in the Fifth Circuit with respect to First Health and not Liberty Mutual, they may not present such a challenge as to Liberty Mutual to this Court. *See Hallie*, 471 U.S. 34, 42 n.5. Further, even as to First Health, the Petitioners never presented the due process issue in the Fifth Circuit. Rather, the Petitioners challenged the injunction as lacking specificity in purported violation of Federal Rule of Civil Procedure 65. *See* Pet. at 13a-14a (Fifth Circuit's opinion discussing argument presented by Petitioners). As such, the Petitioners' due process argument is waived. *See Hallie*, 471 U.S. 34, 42 n.5.

In any event, the Petitioners' argument is meritless, for the Petitioners seemingly have confused their due process rights with those of the unidentified payors. The Petitioners received notice that the unidentified payors were to be included; in fact, First Health, in seeking the January 2008 injunction, expressly indicated that was its intent. The Petitioners thereafter fought tooth and nail regarding notice and to prevent an injunction. Indeed, this Petition is an example of the vigor with which the Petitioners opposed the injunction. If anything, it is the unidentified payors who may not have received any notice that they would benefit from the injunction. The payors, however, have not petitioned this Court for review, and obviously would not, and have not, complained about the injunction.

CONCLUSION

Liberty Mutual sought and obtained a permanent injunction against the Petitioners following nearly four years of litigation. Though the Petitioners chose not to appeal that portion of the injunction in favor of Liberty Mutual and instead limited their appeal to the portion in favor of First Health, now that the Fifth Circuit has affirmed the injunction, the Petitioners in this Court launch several unmerited attacks in Liberty Mutual's direction. Such a tactic should not be countenanced, much less be sufficient to warrant this Court's review.

On the merits, the lower courts correctly applied applicable law in finding they had subject matter jurisdiction, and in refusing to abstain. Because diversity jurisdiction exists, under *Horton*, jurisdiction existed notwithstanding any connection to workers' compensation laws. Moreover, because the *Trejo* factors are satisfied, and because there is no other adequate forum to hear Liberty Mutual's

claims, abstention would have been improper. The Petition should be denied.

Respectfully submitted,

JUDY Y. BARRASSO
Counsel of Record
EDWARD R. WICKER, JR.
STEPHEN L. MILES
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER, L.L.C.
909 Poydras Street, Suite 2400
New Orleans, LA 70112
Telephone: (504) 589-9700
Facsimile: (504) 589-9701

Attorneys for Respondent, Liberty Mutual Insurance Company

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

LIBERTY MUTUAL INSURANCE COMPANY	:	**DOCKET NO. 04-2405**
VS.	:	**JUDGE TRIMBLE**
DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL	:	**MAGISTRATE JUDGE WILSON**

AMENDED JUDGMENT

(Filed Apr. 12, 2006)

Pursuant to a telephone conference among the parties held on the March 21, 2006, regading [sic] the "Motion to Alter Judgment" (doc. #100), the Judgment rendered February 15, 2006 is hereby amended as follows:

For the reasons set forth in the Memorandum Ruling issued on February 15, 2006,

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. #79) filed by Liberty Mutual Insurance Co. is hereby **GRANTED** relieving Liberty Mutual of any obligation to pay defendants, Dr. Clark Gunderson and Lake Charles Memorial Hospital any additional sums.

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc.

#70) filed by First Health Group, Inc., is hereby **GRANTED IN PART,** to the extent that First Health does not owe Liberty Mutual indemnity for under-payments sought by Defendants, Dr. Clark Gunderson and Lake Charles Memorial Hospital against Liberty Mutual.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the court directs the entry of a Final Judgment as to the issues decided herein above pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court having determined that there are still remaining claims to be adjudicated, but no just reason for delay in the parties' right to appeal the issues decided.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Liberty Mutual's claim for attorney fees and damages will be deferred to a later date.

IT IS ORDERED, ADJUDGED AND DECREED that the motion to strike (doc. #27) filed by Dr. Clark Gunderson and Lake Charles Memorial Hospital is **DENIED** as **MOOT.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants, Gunderson and LCMH are to pay all costs of court.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 12th day of ~~March~~ April, 2006.

/s/ James T. Trimble
JAMES T. TRIMBLE, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-30545

04-2405

LIBERTY MUTUAL INSURANCE CO

Plaintiff-Appellee

v.

CLARK GUNDERSON, Dr;
LAKE CHARLES MEMORIAL HOSPITAL

Defendants-Appellants

Appeals for the United States District Court for the Western District of Louisiana, Lake Charles

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(Filed Oct. 3, 2006)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's motion to dismiss the appeals for lack of jurisdiction is **GRANTED**.

IT IS FURTHER ORDERED that appellee's alternative motion to stay briefing pending disposition of the motion to dismiss is **DENIED as unnecessary**.

IT IS FURTHER ORDERED that appellee's motion for an extension of time to file its brief until twenty (20) days after denial of the motion to dismiss is **DENIED as unnecessary**.

(3)

No. 08-1300

Supreme Court, U.S.
FILED
JUN 17 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DR. CLARK GUNDERSON and
LAKE CHARLES MEMORIAL HOSPITAL,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY and
FIRST HEALTH GROUP CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT FIRST HEALTH GROUP CORP.

PERRY R. STAUB, JR.
Counsel of Record
DONALD J. MIESTER, JR.
TAGGART MORTON, L.L.C.
2100 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2100
(504) 599-8500

Attorneys for Respondent
First Health Group Corp.

223551

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether a federal district court with diversity and federal question jurisdiction in a case filed originally in federal court has the power under the All Writs Act to enjoin parties from relitigating the issues it has conclusively decided.

2. Whether a federal district court correctly refuses to abstain from hearing a declaratory judgment action if the plaintiff's claims before it cannot be heard in a state forum due to jurisdictional limitations (this question presumes hypothetically that abstention is properly before this Court, which it is not).

3. Whether a district court may enjoin a plaintiff from relitigating the same issues it lost in federal court as part of a state proceeding (1) against a party to the federal case, and (2) against those in privity with the successful federal party.

RULE 29.6 DISCLOSURE

First Health Group Corp. is a subsidiary of Coventry Health Care, Inc., a publicly traded company whose New York Stock Exchange symbol is CVH.

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STATEMENT OF THE CASE

First Health's Preferred Provider Organization

First Health Group Corp. operates a Preferred Provider Organization. First Health's PPO essentially consists of two sets of interlocking contracts. To begin with, First Health enters into Provider Agreements with hospitals and other entities furnishing medical services under which the providers agree to accept discounted rates in return for becoming part of the First Health PPO. Second, First Health enters into agreements with health insurers and other entities responsible for providing medical care, commonly called payors, who contract with First Health for the privilege of joining its PPO and reaping the benefits of the discounted rates First Health negotiates with the providers.

First Health's PPO has worked just as intended for many years: providers benefit by obtaining increased patient volume through the PPO, payors benefit by being charged far less for the medical care for which they have to pay than they otherwise would have been charged, and patients have access to the same quality of medical care they always enjoyed. But a group of Louisiana health care providers has recently begun to challenge the propriety of First Health's PPO, arguing that (1) First Health's provider agreements are supposedly invalid under the Louisiana Any Willing Provider Act,[1] and (2) when applied to occupationally injured employees, the provider agreements are allegedly invalid because they authorize discounting provider bills below the fee schedule set forth in the Louisiana Worker's Compensation law.

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1. LSA-R.S. 40:2201 *et seq.*

Petitioners Gunderson and Lake Charles Challenge the Validity of First Health's Provider Agreements

Dr. Clark A. Gunderson and Lake Charles Memorial Hospital are two providers that entered into contracts with First Health to participate in its PPO, and both took the lead in challenging the validity of the First Health provider agreements. Gunderson and Lake Charles filed a barrage of disputed claims with the Louisiana Office of Workers' Compensation seeking, in direct breach of their Provider Agreements, additional money for medical services performed, together with penalties and attorney's fees. Gunderson and Lake Charles also instituted a class action proceeding in the Louisiana 14th Judicial District Court for the Parish of Calcasieu, seeking to certify a plaintiff class of medical providers against First Health and other defendants. In the state class action, Gunderson and Lake Charles sought to hold defendants liable for hundreds of millions of dollars in penalties and fees because of the allegedly invalid discounts taken on their medical bills (discounts taken under the very Provider Agreements they themselves signed).

Liberty Mutual Files the Current Suit to Declare the First Health Provider Agreements Valid

Liberty Mutual Insurance Company, an insurer/payor who contracted to become part of the First Health PPO, was named in many of the state workers' compensation proceedings. On November 23, 2004, Liberty Mutual filed this case in the United States District Court for the Western District of Louisiana, alleging subject matter jurisdiction based on both diversity of citizenship[2] and the existence of a federal question[3] under ERISA. Liberty Mutual specifically sought judgment against Gunderson and Lake Charles declaring that (1) the Provider Agreements negotiated between Gunderson & Lake Charles and First Health were valid and enforceable; (2) Liberty Mutual was obligated to pay Gunderson and Lake Charles no more than the negotiated rates for medical services performed; and (3) Gunderson and Lake Charles had no cause of action against Liberty Mutual. Liberty Mutual also brought a breach-of-contract claim against Gunderson and Lake Charles, alleging that it was a third party beneficiary to First Health's Provider Agreements; that Gunderson and Lake Charles had breached those agreements; and that it was accordingly entitled to damages and indemnity. On March 23, 2005, Liberty Mutual amended its Complaint to include an additional federal claim under the Contract Clause of the United States Constitution, arguing that Louisiana's Any Willing Provider Act, to the extent it supplemented or varied the terms of Liberty Mutual's contractual agreements, violated its federal constitutional rights.

2. 28 U.S.C. § 1332.

3. 28 U.S.C. § 1331.

The District Court Denies Petitioners' Abstention Request

Gunderson and Lake Charles immediately moved to dismiss Liberty Mutual's suit, arguing that the federal court should abstain in deference to the ongoing state worker's compensation proceedings. On April 13, 2005, the district court denied Gunderson and Lake Charles' motion:

> "Abstention from the exercise of federal jurisdiction is the exception, not the rule." This Court has "a strict duty to exercise the jurisdiction that is conferred upon [it] by Congress." Liberty Mutual argues that this Court has no discretion here because it is seeking damages for breach of contract in this lawsuit. In addition, in its amended complaint, Liberty Mutual alleges that Louisiana Revised Statute 40:2203.1(B) runs afoul of the constitutional prohibition against impairment of contracts. Thus Liberty Mutual maintains that the OWC's limited jurisdiction prohibits it from hearing the contract claim, and furthermore, the OWC cannot rule on constitutional issues.
>
> Liberty Mutual further cites numerous cases that hold that this court has no discretion when a plaintiff's claim is one for damages, *i.e.*, the contract claim, and the Court has a "strict" and "virtually unflagging" obligation to exercise jurisdiction over this case. Consequently, this Court will not abstain from hearing this matter.

Liberty Mutual Adds First Health as a Defendant and Both Parties Move for Summary Judgment, Placing at Issue Whether the First Health Provider Agreements are Valid

Once it successfully resisted plaintiffs' abstention request, Liberty Mutual amended its Complaint to name First Health as an additional defendant, seeking indemnification from First Health if First Health's PPO contracts created any liability on Liberty Mutual's part.

Liberty Mutual and First Health then moved for summary judgment. First Health contended it was not obligated to indemnify Liberty Mutual for amounts allegedly due to Gunderson or Lake Charles (or, for that matter, to any other health care provider that contracted with First Health) because the First Health Provider Agreements were valid and enforceable as a matter of law, and could not form the basis for liability under the terms of the Louisiana Any Willing Provider Act or any other state law. Liberty Mutual's motion agreed with First Health that the First Health Provider Agreements were completely valid, and sought a declaratory judgment that it owed Gunderson and Lake Charles no additional fees. Gunderson and Lake Charles vigorously contested these motions, filing memoranda in opposition and moving to strike First Health's summary judgment motion from the record as procedurally and legally defective.

On February 15, 2006, the district court granted First Health's and Liberty Mutual's motions for summary judgment, and shortly thereafter certified its ruling as final under Rule 54(b). In its ruling, the court

stated that the first issue was whether "the payment provision of the Provider Agreements between First Health, Gunderson, and [Lake Charles]" was "valid and enforceable." The court agreed with Liberty Mutual and First Health that the Louisiana Any Willing Provider Act did not apply because of an exemption from the statutory notice requirement for directly contracted group purchasers. The court also agreed with Liberty Mutual and First Health that the Louisiana Workers' Compensation Law did not prohibit discounting below the workers' compensation fee schedule. Lastly, based on these two foundational findings, the court determined that Liberty Mutual could never be liable for additional money owed to providers over and above the amounts called for in First Health's Provider Agreements, and accordingly granted First Health's motion for summary judgment on Liberty Mutual's indemnification demand.

Gunderson and Lake Charles appealed the court's Rule 54(b) judgment. Bizarrely, instead of addressing the issues resolved by the court and certified as final under Rule 54(b), Petitioners' brief to the Fifth Circuit Court of Appeals instead chose to argue solely that the district court should not have denied their Rule 12(b)(6) abstention motion a year earlier. Not surprisingly, on October 6, 2006 the Fifth Circuit summarily dismissed the appeal.

The District Court Enjoins Petitioners from Relitigating in State Court the Issues They Lost in Federal Court

While these issues were being fought in federal court, the parties engaged in litigation on the state front as well. As noted above, First Health and its Provider Agreements were implicated in a class action suit pending in the Louisiana 14th Judicial District Court for the Parish of Calcasieu. The named class representatives in the state action included Gunderson and Lake Charles, and the plaintiffs named First Health as a defendant. The allegations made by the plaintiff class against First Health raised several legal issues decided in the federal litigation, including (1) whether the First Health Provider Agreements were valid and enforceable under Louisiana law; (2) whether First Health was required to comply with the notice requirements under the Any Willing Provider Act; and (3) whether discounting fees for medical services rendered to occupationally ill or injured workers was permitted under Louisiana law.

Because the issue preclusion doctrine prevented Gunderson and Lake Charles from relitigating in state court issues they previously lost against First Health in federal court, on October 24, 2006, First Health moved the district court to enter a temporary restraining order, preliminary injunction, and permanent injunction against Gunderson and Lake Charles based on its February ruling in First Health's favor on the substantive issues in the federal case. Following full

briefing, on October 30, 2006, the court granted First Health's motion, and entered the following order:

> **IT IS ORDERED, ADJUDGED AND DECREED** that the Motion for Temporary Restraining Order, Preliminary and Permanent Injunction, and Stay Order filed by First Health Group Corp., be and it is hereby **GRANTED**, and pursuant to the All Writs Act, a temporary restraining order and preliminary injunction is hereby issued enjoining and preventing defendants Clark A. Gunderson, M.D. and Lake Charles Memorial Hospital ("Defendants") from pursuing any claim before any court arising under Louisiana's Any Willing Provider Act, against First Health Group Corporation or any Payor as set forth in the provider agreements between First health and Defendants, including without limitation pursuing such claims in the matter styled *Gunderson et al v. F.A. Richard et al*, currently pending in the 14th Judicial District Court for the Parish of Calcasieu, State of Louisiana.

Approximately one year later, the district court considered whether it should enter a permanent injunction along similar lines. One of the key issues the district court addressed was whether it could enjoin litigation against First Health's payors, who were not formal parties to the federal proceeding. In a November 30, 2007 "Memorandum Ruling" supporting the permanent injunction, the district court determined that it could enjoin Gunderson and Lake Charles from

litigating against First Health's payors the issues that Gunderson and Lake Charles previously lost in federal court:

> To the extent that a payor had a contract with First Health that allowed for discounts to be taken for an occupationally ill/injured worker during the time period in which Dr. Gunderson or LCMH [Lake Charles] had a Provider Agreement, the Court finds that privity exists between First Health and that payor which allows said payor to be included within the scope of this injunction and/or stay. In other words, Gunderson and LCMH can not prosecute claims against any payor that had a contract with First Health . . . that involves claims for underpayment for discounting services for workers compensation patients, and/or failing to comply with the notice requirement provisions of Louisiana Revised Statutes § 40:2203.1.

Accordingly, on January 4, 2008, the court entered a permanent injunction, which prohibited Gunderson and Lake Charles from pursuing any claim "against . . . First Health Group Corp. and/or its payors which alleges that the Provider Agreements during the period from January 1, 2000 through November 30, 2004" were "invalid and/or unenforceable" under Louisiana law.

The United States Court of Appeals for the Fifth Circuit Affirms the District Court in All Respects

Dissatisfied with the district court's ruling, Gunderson and Lake Charles once again appealed to the Fifth Circuit. On November 25, 2008 the Fifth Circuit affirmed the district court's permanent injunction in all respects. The Fifth Circuit rejected Petitioners' argument that the district court lacked jurisdiction to issue an injunction under the All Writs Act, relying in part on this Court's decision in *Horton v. Liberty Mutual Ins. Co.*[4] The Fifth Circuit also found that the district court's injunction properly extended to First Health's payors:

> "Privity is a 'legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion.'" . . . Liberty Mutual and other "payors" entered into Provider Agreement contracts with First Health. Liberty Mutual and First Health actively disputed Gunderson's claims that (1) the discount provisions contained in the Provider Agreements are unenforceable, and (2) that the payment provisions contained in the Provider Agreements do not apply to group purchasers or to agreements of group purchasers. The contractual relationship between First Health and its payors, as well as the identical litigation position against

4. 367 U.S. 348 (1961).

> Gunderson in suits over these contractual provisions, evidence to this Court that First Health and its "payors" are in privity with Liberty Mutual.

In a similar vein, the Fifth Circuit rejected Petitioners' claim that the injunction was fatally flawed by not specifically identifying which "payors" it covered, holding:

> The district court correctly noted that the Provider Agreements between First Health and Gunderson required First Health to provide a payor listing to Gunderson. First Health complied with these requirements, and provided Gunderson with payor listings. Therefore, this Court holds that the permanent injunction is framed in a manner that enables Gunderson to know what conduct the district court prohibited.

One issue the Fifth Circuit did ***not*** address was abstention. Abstention was not addressed in the district court's final summary judgment or injunction rulings, and therefore was not an issue on appeal.

REASONS FOR DENYING THE PETITION

To their credit, Petitioners' application does not try to manufacture a false circuit conflict over the issues they present. Aware of the deficiencies in their arguments, Petitioners instead try to pique the Court's interest by leading off with a silly rhyme parodying Dr. Seuss' *Horton Hears a Who!*, and proceed to muddy the clear waters of this case by invoking a variety of questionable (if not outright wrong) legal theories.[5] Not to be a Grinch, but First Health submits that the lower courts properly stated the rules of law applicable to this case, and correctly applied those rules. There is no reason to grant certiorari.

1. The Fifth Circuit correctly found that the district court possessed subject matter jurisdiction, and could therefore enjoin Petitioners under the All Writs Act from relitigating issues in state court they had already lost in federal court.

The All Writs Act[6] gives federal courts the power to enjoin parties from prosecuting state court actions involving issues they previous lost in federal court.[7] This sort of injunction does not violate the Anti-Injunction Act[8] because it is entered "to protect or effectuate" a

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5. *See generally* Theodor S. Geisel, *Horton Hears a Who!* (1954).

6. 28 U.S.C. § 1651(a).

7. *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 675 (5th Cir. 2003).

8. 28 U.S.C. § 2283.

federal court judgment; indeed, the power to enjoin state proceedings under the All Writs Act "dovetails with the relitigation exception to the Anti-Injunction Act which, although generally prohibiting federal courts from enjoining state proceedings, permits a court to enjoin a state court 'where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.'"[9]

Petitioners don't question these principles, and instead argue that one key requirement of an All-Writs-Act injunction, subject matter jurisdiction, was missing.[10] But how can Petitioners manufacture a lack-of-subject-matter-jurisdiction argument, considering that the district court had both diversity and federal question jurisdiction? They do so by turning this Court's precedent (principally *Horton v. Liberty Mutual Ins.*

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9. *Vasquez*, 325 F.3d at 675.

10. Petitioners mistakenly argue that Louisiana law, not federal law, governs the requirements for an All-Writs-Act injunction based on the preclusive effect of the court's ruling, relying on this Court's decision in *Semtek Int'l Inc. v. Lockheed-Martin Corp*, 531 U.S. 497 (2001). Because federal and state law both require that the court issuing the first ruling possess subject matter jurisdiction, this is a distinction without a difference. Nevertheless, to be precise, federal law governs. *Semtek* directs that state preclusion law applies only if the district court's jurisdiction is based on diversity, and subject matter jurisdiction in this case rested on both diversity and the existence of a federal question. Further, *Semtek* recognized that "in situations in which the state law is incompatible with federal interests," federal law governs the preclusive effect of a prior federal order even if jurisdiction was based solely on diversity. The current case presents just such a situation.

Co.[11]) on its head. Petitioners argue that because they had instituted claims against Liberty Mutual in the Louisiana Office of Worker's Compensation before Liberty Mutual brought its declaratory judgment action, Liberty Mutual's declaratory complaint "effectively removed" the worker's compensation claims.

This is utter nonsense. To begin with, factually, there was no removal; even after Liberty Mutual filed its declaratory judgment complaint in federal court, the state proceedings remained pending in the state worker's compensation office. More to the point, there is no jurisprudence — ***none*** — authorizing or recognizing the concept of "effective removal" on these facts, and Petitioners certainly don't cite any. Recognizing this fatal problem, Petitioners mask their lack of support by instead arguing that *Horton*, the case relied upon by the Fifth Circuit in affirming the district court, should not be "expanded" to permit the federal court to "usurp pending state worker's compensation actions by way of a declaratory judgment."

The problem here is that the district court's jurisdiction (and, hence, its authority to issue an All-Writs-Act injunction) isn't based on *Horton* or any other case; it is simply derived from the fact that the court possessed valid diversity[12] and federal

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11. 367 U.S. 348 (1961).

12. Liberty Mutual is a citizen of Massachusetts; Gunderson and Lake Charles are citizens of Louisiana; and First Health is a citizen of Delaware and Maryland. Further, the amount in controversy requirement for diversity has always

(Cont'd)

question[13] jurisdiction. But to the extent that *Horton* is relevant to this case, it amply supports the Fifth Circuit's conclusion. The *Horton* plaintiff was injured while working in Texas, and the Texas workers' compensation tribunal awarded him $1,050.00. This award satisfied no one; Horton's employer filed suit in federal court to set aside the award in its entirety, and Horton filed an appeal in Texas state court to increase the amount of the award. Horton then moved to dismiss the federal suit, arguing that the federal court lacked jurisdiction because of the then-recently-enacted statutory prohibition against the removal of worker's compensation cases.[14] The district court agreed, and dismissed the suit; but the Fifth Circuit reversed. In affirming the Fifth Circuit, this Court concluded:

> The foregoing [burdens to workers' compensation plaintiffs in having to litigate in federal court] are some of the appealing considerations that led the District Court to conclude that it would frustrate the

(Cont'd)

been present because Gunderson contended he was due more than $76,000 in additional monies from Liberty Mutual, and Lake Charles contended it was due more than $3,000,000. Accordingly, each of the requirements of § 1332 is satisfied.

13. Liberty Mutual alleged in its Complaint that federal question jurisdiction exists when an area of the law is completely preempted (*see, e.g., Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924 (5th Cir. 1997)), and that ERISA preempted Gunderson's and Lake Charles' claims. Additionally, its First Amended Complaint raised a claim under the Contract Clause of the United States Constitution. Either of these claims sufficed to provide federal question jurisdiction under § 1331.

14. 28 U.S.C. § 1445(c).

> congressional purpose to permit insurers to file workmen's compensation suits in federal courts when Congress had deliberately provided that such suits could not be removed to federal courts if filed by claimants in state courts. **But after the most deliberate study of the whole problem by lawyers and judges and after its consideration by lawyers on the Senate Judiciary Committee in the light of statistics on both removals and original filings, Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount.** In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth. Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as removal of such suits, and it could easily do so still. We therefore hold that under the present law the District Court has jurisdiction to try this civil case between citizens of different States if the matter in controversy is in excess of $10,000.[15]

Horton, then, unremarkably held that a federal district court that possesses subject matter jurisdiction can

15. *Id.* at 352 (emphasis added).

entertain a challenge to a state worker's compensation award. Petitioners try to transmogrify *Horton* into standing for the proposition that if there is an ongoing worker's compensation proceeding (instead of a proceeding that has concluded at the trial level), a federal district court cannot entertain a declaratory judgment action affecting that proceeding, even if it unquestionably possesses subject matter jurisdiction. And ***that*** proposition is made up out of whole cloth by Petitioners — it appears nowhere in *Horton* or any other governing decision.

Indeed, this case is similar to *St. Paul Ins. Co. v. Trejo*,[16] which analyzed the meaning of *Horton* and flatly rejected Petitioners' reading of it. The *Trejo* plaintiff successfully convinced a district court to dismiss a federal declaratory judgment action under some sort of "effective removal" theory, relying on a defendant's statutory inability to remove workers' compensation cases. The Fifth Circuit reversed the district court's dismissal of the declaratory judgment action:

> Although the district court acknowledged that St. Paul's lawsuit had not been removed, it nevertheless concluded that the federalism concerns underlying section 1445(c) allowed the lawsuit to be dismissed. The district court reasoned that since St. Paul's lawsuit involved a request for a declaration of rights under a worker's compensation award it was a lawsuit "arising under" the Texas worker's compensation laws. And it concluded that

16. 39 F.3d 585 (5th Cir. 1994).

retaining jurisdiction of the case would thus thwart the congressional purpose behind section 1445(c).

The Supreme Court's decision in *Horton v. Liberty Mutual Ins. Co.* speaks directly to this question. In *Horton*, Liberty Mutual filed a federal lawsuit, on the basis of diversity of citizenship, to set aside a worker's compensation award granted by a state administrative board. Thereafter, Horton filed his own action in state court and then moved for dismissal of the federal lawsuit on jurisdictional grounds. In *Horton*, the Supreme Court held that federal jurisdiction was not barred by the 1958 amendment to Title 28 (now section 1445(c)), which forbade the removal of state worker's compensation cases. The Court observed that while the purposes of the 1958 amendment, such as limiting federal court congestion and eliminating the burdens that worker's compensation claimants might suffer, militated against the exercise of jurisdiction, the amendment did not specifically prohibit jurisdiction in worker's compensation cases which were originally filed in federal court. Further, the Court noted that "Congress used language specifically barring *removal* of such cases from state to federal courts [but] left unchanged the old language which . . . specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed

> jurisdictional amount." The *Horton* court concluded that "we must take the intent of Congress with regard to the filing of diversity cases in federal district courts to be that which its language clearly sets forth."
>
> In accordance with *Horton*, even though St. Paul's declaratory judgment action involved a state workers' compensation law, jurisdiction was still proper based on diversity of citizenship. We accordingly hold that the district court erred in dismissing St. Paul's suit on the basis of section 1445(c) or its purposes.[17]

Predictably, Petitioners conclude their "effective removal" argument by trotting out a parade of horribles that will supposedly occur if the Fifth Circuit's decision stands; Petitioners argue that any worker's compensation party could file a declaratory judgment action in federal court and usurp the state proceedings. But that will never happen. At the very least, abstention will prevent almost all of this sort of case from being heard in federal court, and abstention did not apply to this proceeding only because Liberty Mutual raised

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17. *Id.* at 587-88 (italics in original; citations omitted); *see also Prescott v. United States*, 523 F. Supp. 918, 939 (D. Nev. 1981) ("It is well-settled that although Title 28 U.S.C. Section 1445(c) prevents workmen's compensation suits from being removed to federal court if filed by claimants in state courts, such suits may still be filed in federal court pursuant to Title 28 U.S.C. Section 1332 if there is diversity of citizenship" and the jurisdictional amount is satisfied), *aff'd on other grounds*, 731 F.2d 1388 (9th Cir. 1984).

breach-of-contract and constitutional claims that were outside the jurisdiction of the state worker's compensation tribunal.

2. **Although abstention is not even properly before this Court, the district court correctly determined that it did not have to abstain, considering that plaintiff Liberty Mutual's claims could not have been brought in a Louisiana worker's compensation tribunal.**

This Court should not even address the merits of Petitioners' abstention argument, which is not properly before it. As noted above, abstention was addressed by the district court when it denied Petitioners' motion to dismiss in August 2005. But this writ application is from the Fifth Circuit's November 2008 ruling, which in turn was an appeal only from the district court's grant of First Health's request for injunctive relief based on the its successful summary judgment motion, a judgment long ago certified as final by the district court and as to which Petitioners failed to appeal. Abstention was neither argued to the Fifth Circuit on this appeal, nor addressed in its ruling. Accordingly, this Court should not take it up either.[18]

And what of the merits? The key issue here is that the instant lawsuit is not simply one for declaratory relief. Liberty Mutual coupled its declaratory judgment request with a claim for damages for breach of contract,

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18. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this court will not ordinarily consider them.").

as well as a claim for relief under the Contract Clause of the United States Constitution. When an action involves a demand for monetary or other relief, the propriety of abstention is governed by the "exceptional circumstances" standard articulated in *Colorado River Water Conservation District v. United States.*[19] Under *Colorado River*, a prime factor to consider is whether the state proceedings are inadequate to protect the federal plaintiff's rights.[20] As the district court correctly noted, the Louisiana Office of Workers' Compensation certainly cannot address federal constitutional claims, nor does it possess jurisdiction to award breach-of-contract damages to Liberty Mutual. Indeed, the Supreme Court of Louisiana addressed this very issue only six months ago, holding that "the [worker's compensation] Act does not govern or otherwise regulate contracts between employers, insurers, and owners of PPO networks. Disputes involving contracts between such parties do not 'arise out of' the Act, even where the relevant claims involve the payment of third party medical bills required under the Act."[21] Gunderson and Lake Charles do not seriously argue otherwise, noting only that Liberty Mutual's breach of contract and constitutional claims were supposedly frivolous. But the district court never dismissed these claims, and they remain pending to this day. Gunderson and Lake Charles' own self-serving belief that these claims are meritless is irrelevant; by raising claims outside the

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19. 424 U.S. 800 (1976).

20. *Id.* at 818.

21. *Broussard Physical Therapy v. Family Dollar Stores, Inc.*, 08-1013 (La. 12/2/08); 5 So. 2d 812, 817.

jurisdiction of the workers' compensation tribunal, Liberty Mutual divested the district court of the ability to abstain.

3. The Fifth Circuit correctly affirmed the district court's grant of injunctive relief, which prohibited Petitioners from relitigating the issues they lost in federal court against First Health's payors.

Petitioners' final argument is that they were somehow deprived of due process when the district court entered an injunction against their potential relitigation of the issues they lost in federal court against First Health's payors. Citing *Taylor v. Sturgell*,[22] Petitioners complain that the injunction violates their due process rights because these payors were "unnamed, unidentified, and in no way involved in this litigation." But is this really the case?

To begin with, Gunderson and Lake Charles' entire argument is disingenuous. There is no question that federal collateral estoppel, which governs the preclusive effect of the federal district court's rulings in this case,[23]

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22. 128 S.Ct. 2161 (2008).

23. *See* footnote 10 above. Although Petitioners argue that Louisiana collateral estoppel law is narrower than its federal counterpart, federal law applies, despite the holding of *Semtek*, because (1) the district court's jurisdiction was based, at least in part, on the existence of two federal questions; and (2) the federal issue involved (protecting the efficacy of a federal judgment against potential relitigation by the losing party in state court) is of paramount federal importance.

does not require mutuality, and First Health's payors could defend themselves in state court by invoking collateral estoppel defensively as a shield to a lawsuit instituted against them by Gunderson or Lake Charles.[24] Gunderson and Lake Charles vigorously litigated the validity of the First Health Provider Agreements with First Health, and lost; this loss prevents them, under collateral estoppel, from now suing the other parties to the Provider Agreements in state court. All the district court did was save the time, energy, and expense of forcing hundreds of payors to face the prospect of having to raise collateral estoppel in hundreds of potential cases involving the same issues it conclusively resolved. *Taylor* does not apply to these facts; if it did, the entire federal law of issue preclusion would have to be rewritten.

Even if *Taylor* has some relevance, the district court's injunction would still be perfectly acceptable. *Taylor* recognized that the general principle of nonparty preclusion is subject to exceptions.[25] One of these exceptions is "adequate representation," which refers to a nonparty being "'adequately represented by someone with the same interests who [wa]s a party' to the suit."[26] In this case, both First Health and Liberty Mutual adequately represented the absent payors.

To begin with, First Health's contracted payors enjoyed a sufficiently close legal relationship with First

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24. *United States v. Mendoza*, 464 U.S. 154, 159 (1984).

25. *Taylor*, 128 S. Ct. at 2167.

26. *Id.*

Health to justify the district court's discretionary decision to enjoin Gunderson and Lake Charles from pursuing claims against them. First Health litigated the issue of the validity of its Provider Agreements with Gunderson and Lake Charles, and litigated the issue of whether or not this contractual relationship gave rise to any issue of notice under La. R.S. 40:2203.1 *et seq.* Gunderson and Lake Charles lost their arguments on these issues; the district court properly recognized that these entities should not be permitted to relitigate the validity of their Provider Agreement with First Health simply by substituting a different First Health payor client as a party. Any such claims would be purely derivative of the Provider Agreements the district court determined were valid and enforceable under Louisiana law, and would seek to impose liability based on the payor's failure to give the notice the lower court determined was not required under the law. Because First Health, one of the parties to the bilateral Provider Agreements, successively defeated Gunderson and Lake Charles' best efforts to invalidate them, the other parties to the bilateral agreements should not now face the prospect of having to defend them all over again.

In reality, it was First Health that had the most to lose if the Provider Agreements fell, and no payor could have litigated the issues more strenuously than First Health. First Health was the litigant who ***should*** have defended the agreements, not the payors, and it was both permissible and sensible to include the payors within the scope of the injunction: the payors were represented by First Health, had the same litigation posture, and were parties to the same agreements First Health championed.

Moreover, the absent payors were well represented by Liberty Mutual, itself a contracted payor to the First Health preferred provider network. The source of the rights and obligations of the absent payors was precisely the same as those of Liberty Mutual; the First Health Provider Agreements are, in all relevant respects, identical. Liberty Mutual vigorously defended the agreement to which it is a party, just as any payor would have done. Unless the district court enjoined litigation against the other First Health payors, the prospect existed that Gunderson and Lake Charles could forum shop until they found a court willing to accept their arguments (or found a payor which lacked the financial resources to fight tooth and nail with them, as Liberty Mutual did), get a judgment against that payor, and try to then use that judgment offensively against the other payors. This is exactly the kind of inconsistency of rulings, bringing with it the possible tension between the federal and state systems, that an All-Writs-Act injunction based on preclusion is designed to prevent.

What is more, as the Fifth Circuit recognized, the Provider Agreements imposed an obligation on First Health to provide a payor listing to both Gunderson and Lake Charles. At no time did Gunderson or Lake Charles contest that First Health discharged its obligation to furnish payor listings, rendering any professed confusion about the scope of the injunction mere sophistry.

CONCLUSION

Petitioners cannot establish any compelling reason for this Court to grant certiorari. First Health therefore respectfully requests that the Petition be denied.

Respectfully submitted,

PERRY R. STAUB, JR.
Counsel of Record
DONALD J. MIESTER, JR.
TAGGART MORTON, L.L.C.
2100 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2100
(504) 599-8500

Attorneys for Respondent
First Health Group Corp.

(4)

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IN THE

Supreme Court of the United States

DR. CLARK GUNDERSON AND LAKE CHARLES MEMORIAL HOSPITAL, PETITIONERS

v.

LIBERTY MUTUAL INSURANCE COMPANY ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

ARTHUR M. MURRAY
Counsel of Record

The Murray Firm
650 Poydras Street
Suite 1100
New Orleans, LA 70130
(504) 525-8100

Attorneys for Petitioners

CURRY & TAYLOR • (202) 393-4141

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MAY IT PLEASE THE COURT:

Petitioners Dr. Clark Gunderson ("Gunderson") and Lake Charles Memorial Hospital ("LCMH") hereby submit the following in response to Respondents' First Health Group Corp.'s ("First Health's") and Liberty Mutual Insurance Company's ("Liberty Mutual's) Oppositions to a Petition for Writ of Certiorari.

Gunderson's and LCMH's Petition for Writ of Certiorari involves (1) Liberty Mutual's improper use of the Declaratory Judgment Act (28 USC 2201) to remove pending state workers' compensation cases to a federal forum, and (2) First Health's improper reliance on the declaratory judgment (i.e. a partial final summary judgment) in favor of Liberty Mutual to enjoin actions beyond the scope of the workers' compensation fee dispute between Liberty Mutual and the Petitioners, as well as injunctions in favor of unidentified "payors" not involved in this litigation.

These issues involve important federal concerns including whether the Declaratory Judgment Act can be used as a tool to circumvent the Anti-Injunction Act, as well as constitutional due process concerns. The lower courts' rulings in this case are contrary to applicable concepts of due process recently made clear by this Court in *Taylor v. Sturgell*, ___ U.S. ___, 128 S.Ct. 2161 (2008), which was not available at the time of the trial court's ruling. Therefore, review from this Court is further necessary to be consistent with *Taylor*.

While Petitioners submit that they are challenging the injunctions granted in favor of only First Health and First Health's unidentified payors

(and not Liberty Mutual), the issues presented to this Court for review were sufficiently raised in the Courts below, and therefore were not waived.

A. PETITIONERS HAVE CONSISTENTLY CHALLENGED THE DISTRICT COURT'S AUTHORITY OVER LIBERTY MUTUAL'S ACTION.

The propriety of the injunctions granted in favor of First Health and First Health's unidentified payors turns in part on the district court's authority to render the underlying declaratory judgment (i.e. partial summary judgment) in favor of Liberty Mutual – whether the basis of that authority (or lack thereof) is termed as "jurisdiction" or "abstention". Despite the fact that Appellant-providers have challenged the court's authority over this action since the inception of this case, Respondents suggest that Petitioners have waived their right to now raise those same issues. However, even assuming Petitioners had not once raised the issue of abstention until now – which is clearly not the case – this Court has recognized that abstention issues may be recognized *sua sponte*. *Bellotti v. Baird*, 428 US 132, n.10 (1996), citing *England v. Medical Examiners*, 375 U.S. 411 (1964). See also *City of Houston v. Hill*, 482 U.S. 45, n. 16 (1987).

Contrary to Respondents' assertions, issues concerning the district court's authority over Liberty Mutual's action have been consistently challenged. Petitioners first raised issues of jurisdiction and abstention in their Motion to Dismiss shortly after the litigation began. Petitioners again raised abstention and

jurisdiction when they appealed the declaratory judgment (the partial summary judgment) rendered in favor of Liberty Mutual. The Fifth Circuit, however, dismissed the appeal without reason in a *per curiam* judgment.

Petitioners again raised jurisdictional questions when they appealed the injunctive relief granted in favor of First Health and its unidentified payors, which was supposedly necessary to "protect or effectuate" the judgment in favor of Liberty Mutual. In conducting the required *de novo* review, the Fifth Circuit incorporated its dismissal of Petitioners' appeal of the declaratory judgment, further making the abstention and jurisdiction issues reviewable by this Court. In its opinion affirming the injunctive relief, the Fifth Circuit found that "the appeal was dismissed for lack of jurisdiction because Gunderson improperly attempted to appeal the district court's denial of a 12(b)(6) motion to dismiss," and that "Gunderson failed to brief the only appealable issue, the district court's grant of summary judgment in favor of Liberty Mutual, and therefore abandoned that issue on appeal.[1]"

In other words, with respect to the summary judgment forming the basis of the injunctive relief, the Fifth Circuit bifurcated (1) issues concerning the court's authority to render the judgment, and (2) the merits of the judgment granted in favor of Liberty Mutual. Yet the Fifth Circuit went on to affirm injunctions over state court proceedings finding that

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[1] See FN 4 of the Fifth Circuit's Opinion (11/25/08), attached at page 15A of Petitioners' original Petition for Writ of Certiorari.

the underlying summary judgment was sufficiently "final" and had *res judicata* effect over the state actions that it enjoined. However, it seems illogical that a partial summary judgment could be "final" for *res judicata* purposes if the underlying issue concerning the court's authority (i.e. abstention and/or jurisdiction) to render that judgment was not likewise "final" or subject to appeal. As recognized by the U.S. First Circuit, "[i]t has been uniformly held that a notice of appeal that designates the final judgment encompasses not only that judgment, but also all interlocutory orders that merge into that judgment.[2]" If in fact the issues of jurisdiction and/or abstention were never appealable – but instead only the merits of the partial summary judgment – the injunctive relief in favor of First Health and its unidentified payors should be overturned because there was no "final" judgment upon which to base the injunctions.

Issues concerning the district court's authority to render the underlying summary judgment were consistently raised below, and were considered by the Fifth Circuit in affirming the injunctive relief granted.

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[2] *In Re Olympic Mills Corp*, 33 B.R. 540 (B.A.P. 1st Cir 2005) citing *John's Insulation Inc. v. L. Addison and Associates*, 156 F.3d. 301 (1st Cir. 1998), citing *Tabron v. Grace*, 6 F.3d 147, 153 n. 2 (3d Cir.1993); *Williams v. General Motors Corp.*, 656 F.2d 120, 125-26 (5th Cir.1981); *Cattin v. General Motors Corp.*, 955 F.2d 416, 428 (6th Cir.1992); *Glass v. Dachel*, 2 F.3d 733, 738 (7th Cir.1993); *Employee Staffing Servs.* v.*Aubry*, 20 F.3d 1038, 1042 (9th Cir.1994); *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1489 (10th Cir.1995); *see generally* 9 James W. Moore, et al., *Moore's Federal Practice* ¶ 203.17[3] at 3-92 & n. 19 (1996); 16A Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 3949.4, at 67 & n. 13 (1996)."

Petitioners therefore have not waived the arguments they now present to this Court.

B. PETITIONERS HAVE NOT WAIVED THEIR DUE PROCESS ARGUMENT AND/OR ANY OTHER ARGUMENT CONCERNING THE PROPRIETY OF THE INJUNCTIVE RELIEF RENDERED IN FAVOR OF FIRST HEALTH AND/OR ITS UNIDENTIFIED "PAYORS."

In addition to jurisdiction and/or abstention issues, Petitioners' herein have also asked this Court to review (1) the district court's improper expansion of the concept the privity to allow non-parties to obtain injunctive relief, and (2) the district court's application of *res judicata* to actions beyond the scope of the judgment itself and/or the controversy involved therein. These issues necessarily involve questions of constitutional due process because Petitioners have been enjoined from pursuing state actions against parties and/or actions not involved herein. As recently recognized by this Court in *Taylor v. Sturgell*, ___ U.S. ___, 128 S.Ct. 2161 (2008) – which had not been rendered at the time that Petitioners filed their original appellant brief to the Fifth Circuit in March 2008 – the *res judicata* effect of a federal judgment is subject to due process limitations.

A cursory reading of the Fifth Circuit's opinion in this matter makes clear that Petitioners challenged the propriety of expanding the *res judicata* effect of the partial summary judgment in favor of only Liberty Mutual to First Health and/or its unidentified payors, as well as to claims or controversies beyond the scope of the judgment. The fact that Petitioners did not

specifically use the phrase "due process" in the courts below is irrelevant in that the *res judicata* effect of the judgment necessarily involves due process concerns. *Taylor*, supra.

C. CREATIVE DRAFTSMANSHIP SHOULD NOT BE A BASIS UPON WHICH TO ALLOW INTERFERENCE WITH PENDING STATE WORKERS' COMPENSATION ACTIONS.

While Respondents attempt to complicate the issues, the only controversy addressed by the declaratory judgment (i.e. partial summary judgment) in favor of Liberty Mutual is whether Liberty Mutual, as a workers' compensation insurer, properly paid Dr. Gunderson and LCMH for their workers' compensation related medical services as required by the Louisiana Workers' Compensation Act (La. R.S. 23:1021 et. seq). It is undisputed that this same fee payment dispute was pending between Liberty Mutual and Petitioners in hundreds of state workers' compensation actions long before Liberty Mutual sought declaratory relief from federal court.

The fee payment dispute did not involve First Health (who is not a workers' compensation payor) and/or any other First Health payor. Contrary to First Health's assertions, First Health did not file any claims against Petitioners, did not litigate any dispute with Petitioners, and in fact, First Health obtained no judgment against Petitioners warranting the injunctive relief granted. Further, the injunctions in favor of the unidentified payors should not be justified by the fact that Petitioners did not challenge, at the summary judgment phase, whether First Health provided them

with required payor listings because (1) the summary judgment did not involve any other payor, and (2) First Health filed no claims against Petitioners.

Respondents suggest that this Court should ignore fundamental policies embodied in the Anti-Injunction Act and the Declaratory Judgment Act, and condone the effective removal of hundreds of pending, otherwise non-removable, state workers' compensation actions, simply because Liberty Mutual cleverly tacked on a breach of contract claim and constitutional challenge to its declaratory action. However, this Court long ago refused to allow a defendant in a pending state action to pursue a declaratory action in federal court or otherwise seek to enjoin the pending state action. *Samuels v. Mackell*, 401 US 66 (1971). In so doing, this Court observed:

> "[O]rdinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place, the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting '[f]urther necessary or proper relief,' 28 U.S.C. § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declaratory

> judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would."

The creative breach of contract claim and constitutional challenge, which are still pending nearly five years later, should not serve to override the principles enunciated in *Samuels*.

Liberty Mutual's breach of contract claim does nothing more than assert an unsupported theory that Petitioners breached their contract with First Health because they filed fee payment disputes against Liberty Mutual in state workers' compensation court long before the instant action. The impropriety of relying on this claim to take precedence over mandatory abstention concerns is highlighted by the fact that (1) the claim is not ripe for adjudication because there has been no ruling in any of the workers' compensation actions and (2) the only damages available would result from a workers' compensation judgment rendered against Liberty Mutual. Further, allowing such procedural gamesmanship in this case would allow any workers' compensation insurer to remove its defenses to pending state workers' compensation actions by filing a "declaratory action" and tacking on either an allegation that the employee breached its employment contract by simply suing the insurer, or an allegation that its potential damages are unconstitutional.

Likewise, Liberty Mutual's constitutional challenges of the Louisiana PPO Act (La. R.S. 40:2201 et. seq) should not undermine mandatory abstention.

These constitutional concerns arise solely from Liberty Mutual's affirmative defense to the workers' compensation fee payment dispute. It is well established that an anticipated affirmative defense to a declaratory-defendant's (i.e. the traditional Plaintiff's) action against the declaratory-plaintiff does not affect the federal court's jurisdiction over the declaratory action[3], and likewise, an affirmative defense should not justify an interference with pending state proceedings. Further, Louisiana law provides a procedure for workers' compensation defendants such as Liberty Mutual to raise constitutional defenses[4]. Contrary to First Health's assertions, the constitutional questions did not transform this case into one of "federal question" jurisdiction, and in fact, the district court exercised jurisdiction solely on the basis of diversity under 28 USC 1332.

Respondents have provided no authority to support their theory that the additional claims tacked on to Liberty Mutual's declaratory action somehow gave the district court authority to the otherwise improper declaratory judgment. This Court's *Horton*[5] decision simply stands for the proposition that, with respect to Texas workers' compensation cases, once the Texas administrative board issues an opinion, either party may file an original action (as permitted by Texas law) in federal court, as opposed to state court, if diversity jurisdiction is satisfied. What Respondents deemphasize to this Court, however, is that Liberty

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[3] *Skelly Oil v. Phillips Petroleum*, 339 U.S. 667 (1950); *Public Service Commission v. Wycoff Co.*, 344 US 237 (1973).

[4] La. R.S. 23:1310.3(F)

[5] *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348 (1961)

Mutual's declaratory action was not an original action, but instead, an effective removal of pending workers' compensation actions. Further, the *Trejo*[6] case relied upon by Respondent First Health likewise involved an original action involving the interpretation of a workers' compensation related settlement agreement. First Health further fails to recognize that the *Trejo* court actually remanded the case for consideration of whether abstention pursuant to the Declaratory Judgment Act was required.

Because the district court lacked authority to render the underlying summary judgment in favor of Liberty Mutual, the injunctive relief granted in favor of First Health and its unidentified payors, which was based upon that judgment, is improper. Further the injunctive relief is beyond the scope of the judgment in favor of Liberty Mutual, and benefits entities not parties thereto. Therefore, the injunctive relief is further improper.

RESPECTFULLY SUBMITTED:

ARTHUR M. MURRAY
THE MURRAY FIRM
650 Poydras Street, Suite 1100
New Orleans, LA 70130
Telephone: (504) 525-8100

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[6] *St. Paul Ins. v. Trejo*,39 F.3d 585 (5th Cir. 1994)